

1-1-1996

# Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit

Fritz Snyder

*University of Montana School of Law*, [fritz.snyder@umontana.edu](mailto:fritz.snyder@umontana.edu)

Follow this and additional works at: [http://scholarship.law.umt.edu/faculty\\_lawreviews](http://scholarship.law.umt.edu/faculty_lawreviews)

 Part of the [Legal Writing and Research Commons](#)

---

## Recommended Citation

Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 Okla. L. Rev. 573 (1996),  
Available at: [http://scholarship.law.umt.edu/faculty\\_lawreviews/89](http://scholarship.law.umt.edu/faculty_lawreviews/89)

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Law Review Articles by an authorized administrator of The Scholarly Forum @ Montana Law.

# OKLAHOMA LAW REVIEW

---

VOLUME 49

WINTER, 1996

NUMBER 4

---

## LEGISLATIVE HISTORY AND STATUTORY INTERPRETATION: THE SUPREME COURT AND THE TENTH CIRCUIT

FRITZ SNYDER\*

### *Introduction*

Ever since Justice Antonin Scalia took his place on the Supreme Court in 1986, one area of continuing controversy has been the use of legislative history in determining legislative intent. Although the issue has been around a long time, it achieved new life and new prominence in 1986.<sup>1</sup> Well over a hundred law review articles have appeared on this topic in the last ten years. Despite the plethora of articles, very few of them have done any kind of statistical analysis on how the debate and controversy have affected the Supreme Court's interpretation of statutes. Thus, I analyzed all the cases for the calendar year 1995 to see how heavily legislative history was used to interpret statutes. Given the fact that the Supreme Court (or at least individual members) may have altered its views on the uses of legislative history, how has that affected other federal courts? I decided, then, to take one federal circuit court (the Tenth Circuit

---

\* Law Librarian and Assistant Professor, The University of Montana School of Law. I wish to thank my research assistants, Jody McCormick and Shane Coleman, for their valuable work on this project.

A number of kind individuals also took the time to read my manuscript and make valuable suggestions. I wish, in particular, to thank the following: Peter Schanck, Professor of Law, Marquette University School of Law; Carl Tobias, Professor of Law, University of Montana School of Law; Kathleen Magone, Visiting Professor, The University of Montana School of Law; and Fran Wells, Computer Services Librarian and Assistant Professor, The University of Montana School of Law.

Finally, I wish to thank Charlotte Wilmerton, Faculty Secretary, The University of Montana School of Law, for her excellent help in preparing the manuscript.

1. However, William Eskridge says the "annus mirabilis" for the renaissance was 1982 when J. WILLARD HURST, *DEALING WITH STATUTES* (1982); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1987); and Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982), were all published. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 335 n.1 (1994).

Court of Appeals) and analyze all of its cases for 1995 to see how it deals with legislative history.

In addition, because I discovered from my analysis that legislative history continues to play an important role in interpreting statutes and because I have often been asked how to find federal legislative history, I believe it useful to explain how to do legislative history research and how to find legislative history materials (see Appendix C). Based on my empirical study of 1995 Supreme Court and Tenth Circuit cases, I have been able to determine what legislative materials are important and what are essentially irrelevant.

To lay the framework, I will first discuss the different theories of statutory interpretation, noting how legislative history fits into the picture, and observing the reliance on dictionaries for interpreting words and phrases. Also, it is necessary to see what use is being made of administrative interpretations of statutes and how that ties in with legislative history. Finally, while Justice Scalia deserves particular attention, the views of the other justices concerning statutory interpretation and legislative history receive scrutiny as well.

Turning to the theories of statutory interpretation, one commentator has noted that "[o]ne must have a theory, or at least a defensible and replicable method, to resolve hard statutory cases."<sup>2</sup> Without a theory or a replicable method, a judge will be unpredictable and inconsistent in his or her approach to statutory interpretation. There are essentially three theories. Intentionalism directs the interpreter to "discover or replicate the legislature's original intent as the answer to an interpretive question."<sup>3</sup> Purposivism, the second theory, says that statutory ambiguities can be resolved by identifying the purpose or objective of the statute and then by determining which interpretation is most consistent with that goal.<sup>4</sup> Both intentionalism and purposivism rely on legislative history.

The third theory, textualism, argues that the beginning and, usually, the end of statutory interpretation should be the apparent meaning of the statutory language.<sup>5</sup> "The simplest version of textualism is enforcement of the 'plain meaning' of the statutory provision; that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?"<sup>6</sup> If the language has a plain meaning, a textualist court will usually not analyze any evidence of what the statute means. The court will usually not consider evidence extrinsic to — that is, outside of — the statute.<sup>7</sup> The plain meaning interpretation seeks to identify the impact that statutory language would have to a

---

2. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 262 (1992).

3. ESKRIDGE, *supra* note 1, at 14.

4. *See id.* at 25-26.

5. *See id.* at 34.

6. *Id.* at 38.

7. *See* HELENE SHAPO & MARSHALL SHAPO, *LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS* 69 (1996).

typical lay reader.<sup>8</sup> In this context, then, ordinary dictionaries play an important role.<sup>9</sup> The one well-recognized exception to the plain meaning rule, even among its strongest adherents, is where a construction of the words would lead to an absurd result.<sup>10</sup>

One problem with the plain meaning rule is that what is plain to one judge is not plain to another. One particularly striking example of this concerned two of the very strongest adherents of the plain meaning rule, Justice Scalia and Judge Kozinski of the Ninth Circuit, who could not agree whether a gun used as barter in a drug transaction was used "in relation to . . . [a] drug trafficking crime."<sup>11</sup> Kozinski argued that the plain language of the statute so clearly covered gun-for-drugs trades that resort to legislative history was unnecessary.<sup>12</sup> He did not address whether trading a gun for drugs was "using" a firearm within the meaning of the statute. With respect to the "in relation to" language, Kozinski said:

It is difficult to think of a term broader than "in relation to"; I can envision no plausible interpretation of the phrase that would place Phelps beyond the reach of section 924(c) . . . . The panel's refusal to apply the statute to a fact situation squarely covered by the clear statutory language, and the full court's failure to correct the error, raise a fundamental question: Is there any law that the courts cannot circumvent through creative "interpretation"? The answer apparently is no.<sup>13</sup>

Interpreting the same statutory section in a different case, Justice Scalia said that the statute clearly did *not* apply to gun-for-drugs trades, based on the "ordinary meaning" of its terms.<sup>14</sup> John Polich commented: "Kozinski and Scalia appeared to agree on only one thing — that the meaning of the statute should be obvious to anyone who reads it."<sup>15</sup> In addition to Justice Scalia and Judge Kozinski, the more outspoken supporters of textualism include Judge Frank Easterbrook of the Seventh Circuit and Judges Kenneth Starr and James Buckley of the District of Columbia Circuit.<sup>16</sup>

8. See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1441 (1994) [hereinafter *Looking It Up*].

9. See *infra* text accompanying notes 104-26.

10. If the words of a statute are clear, and the construction of those words will not lead to an absurd result, the words are assumed to be the "final expression of the meaning intended." *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929).

11. 18 U.S.C. § 924(c)(1) (1994).

12. See *United States v. Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990) (Kozinski, J., dissenting from denial of rehearing en banc).

13. *Id.*

14. See *Smith v. United States*, 508 U.S. 223, 242-46 (1993) (Scalia, J., dissenting).

15. John Polich, *The Ambiguity of Plain Meaning: Smith v. United States and the New Textualism*, 68 S. CAL. L. REV. 259, 282 (1994).

16. See *id.* at 272; see also Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Recurring Question — Clarification or Confusion?* 16 SETON HALL LEGIS. J. 551, 603 (1992). Araujo notes the following cases and judges in particular: *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.); *International Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987) (Buckley, J., concurring); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (Starr, J.); *Wallace v. Christensen*, 802 F.2d 1539, 1557 (9th Cir. 1986) (Kozinski, J., concurring). See Araujo, *supra*, at 582 n.162.

One area where textualism appears to enjoy a definite advantage over legislative history analysis is its potential for reducing research and litigation costs. Under the textualist approach, lawyers need only consult the statutory text found in the official or unofficial United States Codes. For additional guidance, they could consult a standard dictionary (not even a law dictionary), related provisions in the same statutory code, or any cases analyzing the code section. Time-consuming efforts looking for committee reports, committee hearings, and floor debate would be unnecessary.<sup>17</sup>

Textualism also is appealing because the "intent" of the Congress with respect to a word or phrase or section of a statute can be such an elusive thing. This is an outgrowth of public choice theory, in which the "methodology of economics is applied to the democratic marketplace of the legislature."<sup>18</sup> Public choice theory seeks to demonstrate that legislators frequently were *not* "reasonable persons pursuing reasonable purposes reasonably."<sup>19</sup> Also, statutes frequently did not embody broad public policy purposes and were often the result of no more than compromises, often involving special interest groups.<sup>20</sup> Thus, Judge Easterbrook has argued that "legislatures cannot have intents or purposes."<sup>21</sup> For Easterbrook, legislatures "have 'only outcomes,' not 'intents' or 'designs.'"<sup>22</sup>

On the other hand, "[o]ne might argue that while Justice Scalia's rhetoric of deference to text . . . evokes a humble, subservient role for the judiciary, the reality is that his brand of textualism arrogates to the judiciary a power to frustrate legislative . . . frameworks."<sup>23</sup> Things would be much easier if it were only a simple, objective test to discover the plain meaning of a word or a phrase or a section of a statute. The Scalia-Kozinski conflict<sup>24</sup> shows that this is not always possible.

### *Legislative History*

Legislative history plays a role in both the theories of purposivism and intentionalism. However, four main arguments oppose reliance on legislative history to interpret statutes. First, reliance on legislative history may substitute the will of committees or individual legislators for that of the entire body. Second, legislative history is not signed by the President and represents, at best, the will of only one of the three branches of government. Third, legislative history is unavailable to the average practitioner.<sup>25</sup> Fourth, as noted previously,<sup>26</sup> how can one really know what

---

17. See Polich, *supra* note 15, at 278.

18. Frickey, *supra* note 2, at 250.

19. *Id.*

20. See *id.*

21. *Id.* at 252 (citing Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983)).

22. *Id.* at 253 (quoting Easterbrook, *supra* note 21, at 547).

23. Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445, 458 (1993) (footnotes omitted).

24. See *supra* text accompanying notes 11-15.

25. See Michael Livingston, *Congress, the Courts and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 819 (1991).

26. See *supra* text accompanying notes 18-22.

the intent of the Congress is with respect to a specific word, phrase, or section in a statute?

One observer has argued that legislative history research is simply impractical for most attorneys:

Legislative history requires extraordinary amounts of research. It consists, at a minimum, of committee reports, conference reports, records of committee hearings, floor statements, Presidential signing statements, and all previous legislation or documents of any nature to which any of the foregoing refer. Only the largest law libraries normally carry all these materials, and the materials are generally not available at all outside major metropolitan areas. Ordinarily all of the material must be read . . . because there is no way of knowing in advance where something pertinent may be found. If a lawyer were required to become knowledgeable in the legislative history of a statute he was interpreting in order to be regarded as having acted with professional competence, most of the lawyers in this country would be guilty of malpractice.<sup>27</sup>

This bleak view even extends to the lower courts: "[C]ompared to most lower courts the Supreme Court has a luxury of time, a superb library, an army of law clerks, a wealth of legislative history and a large body of legal briefs to inform its interpretive inquiry."<sup>28</sup>

These negative views are clearly overstated although they do emphasize the confusion that surrounds the search for legislative history. I have sought to alleviate this confusion in my Appendix C to this article concerning legislative history research.<sup>29</sup> For example, finding committee reports can really be quite simple if the researcher is aware that statutory sections in the *United States Code Annotated* contain cross references to the widely available West publication *United States Code Congressional and Administrative News* which reprints the full text (or most of the full text) of the most important committee reports, including conference committee reports, for the last fifty years. "Legislative history is not difficult to find, at least not for the lawyer trying to understand an unclear statute."<sup>30</sup>

Textualists argue that the only legitimate use of legislative history is to correct mistakes, usually ambiguities, in statutory language.<sup>31</sup> "The argument in favor of using legislative history, simply put, is that context is important to the ascertainment of meaning, and legislative history is an important part of context."<sup>32</sup> Or, as another commentator has said:

---

27. W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 408 (1992).

28. James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 6 (1994).

29. See *infra* appendix C.

30. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 869 (1992). When Justice Breyer wrote this article, he was a judge on the First Circuit.

31. See Slawson, *supra* note 27, at 423.

32. Livingston, *supra* note 25, at 38.

Legislative history may be useful in filling the gap. The history can supply information about how the statute is expected to operate, what subjects it addresses, what problems it seeks to solve, what objectives it tries to accomplish, and what means it employs to reach those objectives — all of which the judge may draw upon in testing his tentative construction of the statutory language.<sup>33</sup>

Courts often use legislative histories principally to determine the relevant *purpose*, rather than the specific *intent*, behind the enactment of a statute or particular statutory provision.<sup>34</sup> "The court then interprets the statute to best fulfill that purpose."<sup>35</sup> The legislative history of a statute is authoritative historical evidence because it is a contemporary record made by the enacting legislators. However, crystal-clear legislative history on an interpretive issue is rare.<sup>36</sup>

In the real world, before lawyers give advice to clients about what a statute means, they look (or, at least, should look) at the text of the statute, at cases interpreting the statute, at any legislative history that is reasonably at hand, at the overall legal landscape — and then apply the "lessons of common sense and good policy."<sup>37</sup> This is in contrast to law professors who talk about grand theories.<sup>38</sup> Judges' approaches in their interpretations of a statute are more like lawyers' approaches.<sup>39</sup> Legislative histories may be used to rationalize interpretations reached on other grounds, but this is often true when cases are cited as well.<sup>40</sup> Courts often use legislative history to confirm their interpretation of the text of a statute.<sup>41</sup>

When an issue is not politically sensitive, courts do well to rely on specific statements in the legislative history which elaborate on statutory detail.<sup>42</sup> "Legislators should take responsibility for resolving [politically sensitive] . . . issues in the statutory text, rather than running the risk that private interest groups will manipulate the result through legislative history."<sup>43</sup> Also, "[t]he attraction of relying on such legislative

---

33. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 77 (1994).

34. See Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 U. KAN. L. REV. 815, 819 (1990).

35. *Id.*

36. See Williams N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 356 (1990).

37. *Id.* at 321.

38. See *id.*

39. See *id.*

40. See Peter C. Schanck, *The Uses and Values of Legislative Histories: A Reply*, 82 L. LIBR. J. 303, 304 (1990).

41. See Paul T. Lawless, *City of Chicago v. Environmental Defense Fund: Justice Scalia's Evolution of the Plain Meaning Approach as Applied to RCRA's Household Exemption*, 22 N. KY. L. REV. 115, 131 (1995) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 237 (1994) (Blackmun, J.) ("[T]he legislative history of the Mine Act confirms [the] interpretation.")).

42. See William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301, 315-16 (1990).

43. *Id.* at 315.

history is especially strong in very technical areas of the law."<sup>44</sup> Bankruptcy and taxation are examples of such technical areas. At least in bankruptcy cases, the Supreme Court tends to entertain issues only where the lower courts have split on an issue.<sup>45</sup> The lower courts often engage in a more dynamic approach to statutory interpretation than mere textualism. In many cases the lower courts have analyzed the competing policies (with the use of legislative history) and have reached different results.<sup>46</sup>

When legislative history is used to interpret statutes, what parts of legislative history are most useful? "Both hearings and floor statements have been described as 'the more diffused, less critical parts of the [legislative] process,' and both usually take a back seat to committee report explanations."<sup>47</sup> According to William Eskridge, the Supreme Court has worked out a rough hierarchy of legislative history sources, based on a series of questions on the comparative reliability of each source.<sup>48</sup> "How likely does the source reflect the views or assumptions of the enacting Congress? Is there a danger of strategic manipulation by individual Members or biased groups seeking to 'pack' the legislative history? How well-informed is the source?"<sup>49</sup> Eskridge and Philip Frickey worked out the following hierarchy (most authoritative to least authoritative):

- Committee Reports
- Sponsor Statements
- Rejected Proposals
- Floor & Hearing Colloquy
- Views of Nonlegislator Drafters
- Legislative Inaction
- Subsequent Legislative History<sup>50</sup>

"No one claims that [legislative] history is *always* useful; only that it *sometimes* helps."<sup>51</sup> Judge A. Raymond Randolph, United States Court of Appeals for the District of Columbia Circuit, has commented that nearly every brief he sees in cases involving issues of statutory interpretation contains references to legislative history.<sup>52</sup>

This is a wise precaution on the part of appellate advocates. Counsel can never be sure that the court will find the [statutory] words plain, and stop

---

44. *Id.*

45. See Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 562, 594 (1993).

46. *Id.* at 594.

47. George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 57-58 (quoting Stephanie Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 202 (1982)).

48. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636 (1990).

49. *Id.*

50. See *id.*

51. Breyer, *supra* note 30, at 862 (emphasis added).

52. See Randolph, *supra* note 33, at 76.



there. . . . [P]erhaps the portions of the briefs discussing legislative history ought to be placed under seal — to be opened if, and only if, the judge certifies that the statute appears ambiguous after three readings.<sup>53</sup>

The judge, of course, is alluding to the textualist notion that if the meaning is plain no reference to the legislative history is permissible. Again, though, how is the lawyer going to know that the judge will think the meaning "plain?" Justice Stephen Breyer argues that using legislative history can:

- (A) Help avoid an absurd result;
- (B) Illuminate drafting errors;
- (C) Help take account of specialized meanings;
- (D) Help identify a "reasonable purpose"; and
- (E) Help choose among reasonable interpretations of a politically controversial statute.<sup>54</sup>

This is not to say that the uses of legislative history cannot be improved. "[T]here is widespread agreement that official congressional documents are replete with deceptive statements that suggest a congressional intent that does not in fact exist."<sup>55</sup> Stephen Ross suggests that the following modifications in congressional practices would significantly reduce the likelihood that courts will be deceived by inaccurate legislative history or will ignore legislative history for fear of such deception:

- (A) Publish the transcript of markups;
- (B) Have members sign committee reports;
- (C) Expressly indicate why committee hearings and floor statements should be authoritative; and
- (D) Specify which remarks are directed at the courts.<sup>56</sup>

Committee reports, although usually considered the most reliable part of legislative history, are viewed with disdain by Justice Scalia. He has said they convert "a system of judicial construction into a system of committee-staff prescription."<sup>57</sup> In another case, Justice Scalia stated that committee reports are unreliable, "not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction."<sup>58</sup> He also noted how insignificant a committee's opinion on an issue is in relation to the whole Congress.<sup>59</sup> "All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, . . . and that that text . . . became law. . . . [I]t would be better still to stop confusing [the courts], and not to use committee reports at all."<sup>60</sup> Scalia also complains: "We use them [(committee reports)] when it is convenient, and ignore them when it is not."<sup>61</sup> Judge Kozinski

---

53. *Id.*

54. See Breyer, *supra* note 30, at 848-61.

55. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 575 (1992).

56. See *id.* at 575-77.

57. *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

58. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring).

59. See *id.* at 620 (Scalia, J., concurring).

60. *Id.* at 621 (Scalia, J., concurring).

61. *Id.* at 617 (Scalia, J., concurring).

says that committee reports are usually written by staff or lobbyists, not legislators, and that few legislators read the reports.<sup>62</sup> Moreover, he notes that the reports are not voted on by the committee whose views they supposedly represent (only the underlying bill is), much less by the full Congress, and they cannot be amended on the floor by legislators who disagree with their content.<sup>63</sup> Relying on such language can "short-circuit the legislative process, leading to results never approved by Congress or the President."<sup>64</sup>

Nontextualists' views about committee reports are a good deal different. Thus: "[I]n the ordinary course of legislation, committee reports should be looked to for the most coherent, thorough, and authoritative explanation of a bill's purpose and intended meaning. To abandon altogether reliance on committee reports . . . denies access to the best source of congressional explanation."<sup>65</sup> Justice Brennan argued that, ordinarily, committee reports are considered the most reliable and persuasive element of legislative history.<sup>66</sup> When the Court looked to legislative sources in the 1992 Term, it considered a variety of materials. Committee reports were by far the most relied-upon source, cited usually more than once in each of twenty-four of the cases reviewed.<sup>67</sup> "Committee reports are . . . properly treated as the most reliable type of legislative history."<sup>68</sup> The committee report is generally the only written record available to explain what action a committee has taken on a bill since transcripts of committee markup sessions are not usually available.<sup>69</sup> In 1996 two authorities on legal research, then, could still state: "Reports are generally the most important source of legislative history."<sup>70</sup> For legislative history sources actually used, hearings and floor debate come in a distant second after committee reports.<sup>71</sup>

### *Agency Interpretations*

Legislative history also has a role in determining whether an agency interpretation of a statute should be given deference. In 1984 the Supreme Court, in *Chevron U.S.A.*

62. See *Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinski, J., concurring).

63. *Id.* (Kozinski, J., concurring).

64. *Id.* (Kozinski, J., concurring).

65. *Costello*, *supra* note 47, at 72-73.

66. See *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (Brennan, J.) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.").

67. See Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term*; *Scalia Rails but Legislative History Remains on Track*, 23 SW. U. L. REV. 47, 58 (1993). In 1995 there were 43 references to committee reports in the 29 cases dealing with statutory interpretation. See *infra* p. 594 (table).

68. Popkin, *supra* note 42, at 317.

69. See *Costello*, *supra* note 47, at 46.

70. MORRIS L. COHEN & KENT C. OLSON, *LEGAL RESEARCH IN A NUTSHELL* 167 (6th ed. 1996).

71. "One might expect that hearings, being further removed from congressional decision points, would be accorded less interpretational weight than floor debates. An examination of case law does not reveal such a sharp distinction, however." *Costello*, *supra* note 47, at 57. In 1995, hearings were cited to seven times and floor debate (the *Congressional Record*) was cited to eight times. See *infra* p. 594 (table).

*v. Natural Resources Defense Council*,<sup>72</sup> established a two-step test applicable to judicial review of agency interpretations of agency-administered statutes:

First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>73</sup>

One commentator has noted that the effect of *Chevron* has been to require a reviewing court to give substantial deference to the agency decision in all cases except those in which the intent of Congress is clear.<sup>74</sup>

And since legislative history can be used for determining whether the intent of Congress is clear, the only practical way now for a reviewing court to avoid the substantial deference it must otherwise give to an agency decision is to claim to find a clear legislative intent *in the legislative history*. Since *Chevron*, a reviewing court's use of legislative history is practically assured if the court decides to reverse an agency decision.<sup>75</sup>

Judge Scalia has said that textualism, because of the greater restraints it imposes on judges, should produce less deference to agency interpretations of law.<sup>76</sup>

How did the *Chevron* analysis fare in the Supreme Court in 1995? In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,<sup>77</sup> parties brought an action against the Secretary of the Interior and against the Fish and Wildlife Service, challenging a regulation promulgated by the Secretary under the Endangered Species Act. Justice Stevens, for the majority, said (because congressional intent was not clear) the Secretary's interpretation was "reasonable suffice" to decide the case.<sup>78</sup> "[W]e owe some degree of deference to the Secretary's reasonable interpretation."<sup>79</sup>

The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad

---

72. 467 U.S. 837 (1984).

73. *Id.* at 842-43.

74. *See* Slawson, *supra* note 27, at 401.

75. *Id.*

76. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

77. 115 S. Ct. 2407 (1995).

78. *See id.* at 2416.

79. *Id.*

discretion, we are especially reluctant to substitute our views of wise policy for his. See *Chevron*, 467 U.S., at 865-866. . . . In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA [Endangered Species Act], that the Secretary reasonably construed the intent of Congress.<sup>80</sup>

Justice Scalia dissented, saying: "We defer to reasonable agency interpretations of ambiguous statutes . . . ." <sup>81</sup> In this case, then, he felt the agency interpretation was not reasonable.

In *Reno v. Koray*,<sup>82</sup> Justice Rehnquist, writing for a unanimous court, said that the Bureau of the Prison's internal agency guideline was entitled to some deference since it was a "permissible construction of the statute."<sup>83</sup> In *First Options v. Kaplan*,<sup>84</sup> Justice Breyer wrote: "The law, for example, tells all courts (trial and appellate) to give administrative agencies a degree of legal leeway when they review certain interpretations of the law that those agencies have made."<sup>85</sup> In *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*,<sup>86</sup> Justice Ginsburg, citing *Chevron*, said: "[W]hen we confront an expert administrator's statutory exposition, we inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.'"<sup>87</sup> In *ICC v. Transcon Lines*,<sup>88</sup> Justice Kennedy, writing for a unanimous court, said that the ICC regulation was entitled to deference as an interpretation of the Interstate Commerce Act and cited *Chevron*.<sup>89</sup>

One observer has said: "Appellate courts routinely accord deference to agency construction of ambiguous language in agency-administered statutes."<sup>90</sup> Judge Kelly of the Tenth Circuit, however, said that the court need not accept an agency's interpretation of its own regulations if such interpretation is "unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning'."<sup>91</sup> In *United States v. Richards*,<sup>92</sup> Judge Seymour, writing for the majority, said that the "mixture or substance" to be measured in determining the sentence under the mandatory minimum sentence statute for drug violation did not include waste byproducts.<sup>93</sup> Judge Baldock in a spirited dissent and citing *Chevron* said: "If Congress' intent is clear from the

---

80. *Id.* at 2418.

81. *Id.* at 2430 (Scalia, J., dissenting).

82. 115 S. Ct. 2021 (1995).

83. *Id.* at 2027.

84. 115 S. Ct. 1920 (1995).

85. *Id.* at 1926.

86. 115 S. Ct. 810 (1995).

87. *Id.* at 813.

88. 115 S. Ct. 689 (1995).

89. *See id.* at 696.

90. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749-50 (1995). Pierce, in turn, cited to Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1058-59, for this statement.

91. *Culbertson v. United States Dep't of Agric.*, 69 F.3d 465, 467 (10th Cir. 1995).

92. 67 F.3d 1531 (10th Cir. 1995).

93. *See id.* at 1537.

statutory language, we give effect to that intent, our inquiry is complete, and we do not turn to an agency construction. . . . Because § 841 does not define the terms 'mixture' or 'substance,' they must be given their ordinary meaning."<sup>94</sup> In *Onwuneme v. INS*,<sup>95</sup> Judge Baldock held that an alien's presence in the United States was no longer "lawful" after the entry of the final order of deportation where an alien had failed to satisfy the seven-year domicile requirement, and thus the Board of Immigration Appeals had correctly held that the alien was ineligible for discretionary relief from deportation.<sup>96</sup> The judge said that if the statute is subject to differing but reasonable interpretations, the court is not free to impose its own construction upon the statute: "[R]ather we ask whether the administrative agency's construction is reasonable. If so, we defer to the agency's decision as permissible."<sup>97</sup> In *Osborne v. Babbitt*,<sup>98</sup> an Indian child was deemed to be the legitimate child of decedent's unwed son and thus entitled to a share in his estate. Judge Tacha said that if the statute is ambiguous or silent on the issue in question, the court "must determine whether the agency's determination is based on a permissible construction of the statute . . . . We may ascertain the intent of Congress through statutory language and legislative history."<sup>99</sup> In *Utah v. Babbitt*,<sup>100</sup> Judge Kelly said that because the court found Congress' intent clear with respect to the statute under consideration, the court was unable to subscribe to the agency's "narrow technical view."<sup>101</sup>

Thus, in 1995 the Supreme Court and the Tenth Circuit cited to the *Chevron* case thirteen times. *Chevron* has not made a dramatic difference in the frequency with which the courts defer to agency interpretations of statutes.<sup>102</sup> Many had assumed the *Chevron* framework would result in a greater degree of deference to agency interpretations of statutes,<sup>103</sup> but this was not the case — at least in 1995 in the Supreme Court and in the Tenth Circuit.

### Dictionaries

An interpreter oriented toward effectuating statutory purpose or legislative intent would ideally look to interpretive tools contemporaneous with the drafting of the statute under consideration<sup>104</sup> — that is, legislative history. On the other hand, "a consistent textualist would presumably focus on the way current readers might view a statute"<sup>105</sup> — that is, using an ordinary dictionary to define an unclear or am-

---

94. *Id.* at 1540 (Ealdock, J., dissenting).

95. 67 F.3d 273 (10th Cir. 1995).

96. *See id.* at 275.

97. *Id.* (citing *Chevron*).

98. 61 F.3d 811 (10th Cir. 1995).

99. *Id.* at 812.

100. 53 F.3d 1145 (10th Cir. 1995).

101. *See id.* at 1149.

102. *See* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 359 (1994).

103. *See id.* at 360.

104. *See Looking It Up*, *supra* note 8, at 1446-47.

105. *Id.*

biguous word. The textualist method, with its search for the ordinary meaning ascribed to words by the contemporaneous reader, probably leads to the dictionary more often than does the approach that frames the inquiry in terms of legislative intent.<sup>106</sup> "[D]ictionary definitions, which report common usage, are often mentioned in court opinions which are labeled as literal statutory applications."<sup>107</sup>

However, using ordinary dictionaries to define words and phrases presents its own set of problems.

A . . . problem with dictionary meanings is their fundamental indeterminacy. . . . There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word. The selection of a particular dictionary and a particular definition is not obvious and must be defended on some other grounds of suitability. . . . If multiple definitions are available, which one fits the way an ordinary person would interpret the term?<sup>108</sup>

"Difficulties arise from assuming that dictionaries provide perfect category boundaries and then applying those boundaries to contexts never considered by the authors of the dictionaries."<sup>109</sup>

Another fiction indulged in by the textualist is that Congress writes and votes on statutes with a dictionary by its side. Textualist opinions repeatedly invoke dictionary definitions of statutory text. Yet there is no general statute passed by Congress which provides that all of its words are to be construed according to their strict dictionary definitions. Nor is there any evidence anywhere else . . . demonstrating the Congress has generally incorporated a dictionary as the source for interpreting its work product. . . . [T]extualism seems to include the unarticulated assumption that Congress *intends* that its words will be analyzed according to their strict dictionary definitions.<sup>110</sup>

Judge Learned Hand declared that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."<sup>111</sup>

In the quarter century between 1958 and 1983, the Supreme Court cited to dictionaries on an average of five times per term.<sup>112</sup> In the six terms between 1987 and 1992, the Court never cited dictionaries fewer than fifteen times, with a high point of thirty-two references during the 1992 Term.<sup>113</sup> By my count, the Court cited to

---

106. See Merrill, *supra* note 102, at 357.

107. NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 46.02, at 92 (5th ed. 1992).

108. *Looking It Up*, *supra* note 8, at 1446.

109. *Id.* at 1452.

110. Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320-21 (1990).

111. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), noted in *Looking It Up*, *supra* note 8, at 1437.

112. See *id.* at 1438.

113. See *id.*; see also *id.* at 1454 app.

dictionaries thirty times in 1995. Dictionary definitions appeared in 28% of the cases in the 1992 Term — a fourteen-fold increase over the 1981 Term.<sup>114</sup> Dictionary definitions appeared in 26% of the cases in 1995. Of the nine justices, the one clearly identified textualist, Justice Scalia, had thirteen of the thirty cites to dictionaries in 1995. No one else was even close. Justice O'Connor was second with five.<sup>115</sup> Strictly speaking, in terms of this article, I am dealing with definitions of words in statutes. However, the justices on occasion trotted out their dictionaries to define words in regulations and also in the Constitution as well as in the statutes.<sup>116</sup> Moreover, the justices used legal dictionaries in addition to ordinary dictionaries.<sup>117</sup>

114. See *id.* at 1433; see also *id.* at 1454 app.

115. The totals for 1995 are: Scalia 13; O'Connor 5; Thomas 4; Breyer 3; Ginsburg 2; Stevens 2; Kennedy 1; Rehnquist 0; Souter 0.

116. Justice Breyer —

Justice Breyer defined "employee" within the terms of the National Labor Relations Act, 29 U.S.C. § 152(3) (1994) by citing AMERICAN HERITAGE DICTIONARY (3d ed. 1992) and BLACK'S LAW DICTIONARY (6th ed. 1990). See *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453-54 (1995).

Justice Breyer defined "collect" in the context of the Fair Debt Practices Act, 15 U.S.C. § 1692a(6) (1994) by citing to BLACK'S LAW DICTIONARY (6th ed. 1990). See *Heintz v. Jenkins*, 115 S. Ct. 1489, 1490 (1995).

Justice Ginsburg —

Justice Ginsburg defined "equitable" in 28 U.S.C. § 1552(b) (1994) citing AMERICAN HERITAGE DICTIONARY (3d ed. 1992) and WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983). See *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 499 (1995).

Justice Kennedy —

Justice Kennedy defined "prospectus" as used in the 1933 Securities Act, 12 U.S.C. § 77b(10) (1994) using BLACK'S LAW DICTIONARY (2d ed. 1910). See *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1070 (1995). The third edition of *Black's Law Dictionary* was not published until 1933. Presumably, Justice Kennedy felt that the third edition was not yet published at the time the Securities Act was being considered. Therefore, he may have felt that the appropriate definition to use was the one in print at that time — from the second edition.

Justice O'Connor —

Justice O'Connor defined "use" in 18 U.S.C. § 924(c)(1) (1994) using WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1949) and BLACK'S LAW DICTIONARY (6th ed. 1990). See *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). This statutory section was passed into law in 1968 and amended several times after that. Her use of the 1949 *Webster's Dictionary* may simply have been arbitrary.

Justice O'Connor defined "procedure" in the context of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1102(b)(3) (1994) by citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976) and RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987). See *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1229 (1995).

She defined "injure" in 50 C.F.R. § 17.3 (1994) using WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983). See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2419 (1995) (O'Connor, J., concurring).

Justice Scalia —

Justice Scalia defined "take" in the Endangered Species Act, 16 U.S.C. §§ 1532(19), 1538(a)(1) (1994) and in 50 C.F.R. § 17.3 (1994) by citing 11 OXFORD ENGLISH DICTIONARY (1933) and WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1949). See *Babbitt*, 115 S. Ct. at 2422 (Scalia, J., dissenting). Textualists would normally seem to want quite recent dictionaries so as to give a contemporaneous plain meaning. However, Justice Scalia may have chosen dictionaries that would have been in use when the legislation was originally passed. The second edition of the *Oxford English*

*Dictionary* was published in 1989. The Endangered Species Act was originally passed in 1973.

Justice Scalia defined "harm" in the Endangered Species Act, 16 U.S.C. § 1532(19) (1994) and in 50 C.F.R. § 17.3 (1994) citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), AMERICAN COLLEGE DICTIONARY (1970), J. OPDYCKE, MARK MY WORDS: A GUIDE TO MODERN USAGE AND EXPRESSION (1949), and AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981). *See Babbitt*, 115 S. Ct. at 2423 (Scalia, J., dissenting).

He defined "proximate" in 50 C.F.R. § 17.3 (1994) using BLACK'S LAW DICTIONARY (5th ed. 1979) and WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1949). *See Babbitt*, 115 S. Ct. at 2429-30 (Scalia, J., dissenting).

Scalia defined "endeavor" in 18 U.S.C. § 1503 (1994), citing to 1 NEW SHORTER OXFORD ENGLISH DICTIONARY (1993). *See United States v. Aguilar*, 115 S. Ct. 2357, 2367 (1995) (Scalia, J., concurring in part and dissenting in part).

He defined "corruptly" as used in 18 U.S.C. § 1503 (1994) using BALLENTINE'S LAW DICTIONARY (3d ed. 1969) and BLACK'S LAW DICTIONARY (6th ed. 1990). *See Aguilar*, 115 S. Ct. at 2370 (Scalia, J., concurring in part and dissenting in part).

Justice Scalia defined "market" in the Plant Variety Protection Act, 7 U.S.C. § 2541(3) (1994), by citing OXFORD UNIVERSAL DICTIONARY (3d ed. 1955) and WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1950). *See Asgrow Seed Co. v. Winterboer*, 115 S. Ct. 788, 793 (1995). The Plant Variety Protection Act was passed in 1970.

Justice Stevens —

Justice Stevens defined "harm" in the Endangered Species Act, 16 U.S.C. § 1532(19) (1994) and 50 C.F.R. § 17.3 (1994) using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966). *See Babbitt*, 115 S. Ct. at 2412.

Justice Stevens defined "shows" as used in 18 U.S.C. § 1001 (1994) by citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1942). *See Hubbard v. United States*, 115 S. Ct. 1754, 1758 (1995).

Justice Thomas —

Justice Thomas defined "commerce" in the commerce clause of the United States Constitution, U.S. CONST. art. I, § 8, citing 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773), N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789), T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796), and 3 OXFORD ENGLISH DICTIONARY (2d ed. 1989). *See United States v. Lopez*, 115 S. Ct. 1624, 1643 (1995) (Thomas, J., concurring).

117. The total number of cites to the various dictionaries cited:

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981)	1
AMERICAN HERITAGE DICTIONARY (3d ed. 1992)	2
BALLENTINE'S LAW DICTIONARY (3d ed. 1969)	1
BLACK'S LAW DICTIONARY (6th ed. 1990)	6
BLACK'S LAW DICTIONARY (2d ed. 1910)	1
WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983)	2
WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1942)	1
(2d ed. 1949)	3
(2d ed. 1950)	1
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)	1
(1976)	1
RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)	1
OXFORD ENGLISH DICTIONARY (1933)	1
(2d ed. 1987)	1
OXFORD UNIVERSAL DICTIONARY (3d ed. 1955)	1
N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH	



The Tenth Circuit in 1995, issuing many more opinions than the Supreme Court,<sup>118</sup> only had thirteen cites to dictionaries with Judge Baldock having seven by himself.<sup>119</sup> Also, the judges used legal dictionaries in addition to ordinary dictionaries.<sup>120</sup>

---

LANGUAGE (1828)	1
AMERICAN COLLEGE DICTIONARY (1970)	1
J. OPDYCKE, MARK MY WORDS: A GUIDE TO MODERN USAGE AND EXPRESSION (1949)	1
S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773)	1
N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789)	1
T. SHEPHERD, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796)	1

118. The Tenth Circuit had 449 published opinions in 1995 compared to the Supreme Court's 82 opinions in 1995.

119. Judge Aldisert —

Judge Aldisert defined "minimum" in 18 U.S.C. § 1956 (1994) using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1968). *See* *United States v. Gray*, 56 F.3d 1219, 1225 (10th Cir. 1995).

Judge Baldock —

Judge Baldock defined "liable" and "with" in the Bankruptcy Code, 11 U.S.C. § 509(A) (1994) citing BLACK'S LAW DICTIONARY (5th ed. 1979). *See In re Slomans*, 69 F.3d 468, 473 (10th Cir. 1995). It is not clear why Judge Baldock used the fifth edition of *Black's Law Dictionary* rather than the more recent sixth edition, published in 1990.

Judge Baldock defined "mixture" in 21 U.S.C. § 841 (1994) using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) and *United States v. Chapman*, 500 U.S. 453, 462 (1990) (Rehnquist, J.) (citing 9 OXFORD ENGLISH DICTIONARY (2d ed. 1989)). *See* *United States v. Richards*, 67 F.3d 1531, 1538 (10th Cir. 1995) (Baldock, J., dissenting).

He defined the words "furnish," "supply," and "give" in 42 U.S.C. § 1383(g)(3) (1994) citing BLACK'S LAW DICTIONARY (6th ed. 1990) and WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984). *See* *Johns v. Stewart*, 57 F.3d 1544, 1556 (10th Cir. 1995).

Judge Vazquez —

Judge Vazquez defined "misrepresent" in the Federal Sentencing Guidelines, sec. 2F1.1(b)(3)(A) using RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993). *See* *United States v. Frazier*, 53 F.3d 1105, 1112 (10th Cir. 1995) (Vazquez, J., concurring).

Judge Brown —

Judge Brown defined the word "know" in 18 U.S.C. § 1956(a)(1) (1994) using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). *See* *United States v. Young*, 45 F.3d 1405, 1413 (10th Cir. 1995).

Judge Henry —

Judge Henry defined "corruptly" in 18 U.S.C. § 1503 (1994) citing BLACK'S LAW DICTIONARY (6th ed. 1990). *See* *United States v. Bailey*, No. 94-5219, 1995 WL 716276, at \*3 (10th Cir. Nov. 22, 1995).

Judge Jenkins —

Judge Jenkins defined the word "as" in the phrase "as of the date of death" in N.M. STAT. ANN. § 41-2-2 (Michie Repl. Pamph. 1989) using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971). *See* *Lujan v. Regents of the Univ. of Cal.*, 69 F.3d 1511, 1520 (10th Cir. 1995).

Judge Moore —

Judge Moore defined "community" in 18 U.S.C. § 1151(b) (1994) using WEBSTER'S NEW COLLEGIATE DICTIONARY (1975) and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (no date given). *See* *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1544 (10th Cir. 1995).

120. The judges cited to the following dictionaries:

BLACK'S LAW DICTIONARY (5th ed. 1979)	1
(6th ed. 1990)	3

When a word in a statute is unclear, there is an almost irresistible impulse to reach for sources outside the statute. If legislative history is off-limits, dictionaries present a tempting alternative.<sup>121</sup> "Yet citing to dictionaries creates a source of optical illusion . . . — when appearance may be all there is . . . Words in the definition are defined by more words, as are those words. The trail may be endless."<sup>122</sup> Judge Seymour of the Tenth Circuit quoted from *Learned Hand*: "Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended, which would contradict or leave unfulfilled its plain purpose."<sup>123</sup> When using a dictionary, the Supreme Court justices or the Tenth Circuit judges never explain why they are using a particular dictionary or even why the date of the particular dictionary is relevant. The dates vary widely.<sup>124</sup> The reader infers that judges look for dictionaries containing the definitions they want. "If the court relies on a dictionary, it should make at least some *prima facie* argument about the relevance of that particular dictionary for interpretation of the statute . . . under consideration."<sup>125</sup> Logically, the court should ask whether a definition truly fits with the popular understanding of a term, and it should try to identify a normal meaning rather than merely a permissible meaning.<sup>126</sup>

### *Justice Scalia*

Justice Scalia is easily the most prominent of the textualists. "Unless there is a clear statement to the contrary within the text of the statute, Justice Scalia will assume that terms have their ordinary or commonly-understood meanings."<sup>127</sup> He suspects any legislative history if it is aimed at influencing judicial construction rather than explaining legislative action, and he believes that committee reports are the principal vehicles for such abuse.<sup>128</sup> According to Justice Scalia and other critics, less reliance should be placed on legislative history, and the relative importance of committee

---

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)	1
(1968)	3
(1971)	1
OXFORD ENGLISH DICTIONARY (2d ed. 1989)	1
RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993)	1
WEBSTER'S NEW COLLEGIATE DICTIONARY (1975)	1
WEBSTER NINTH NEW COLLEGIATE DICTIONARY (1984)	1

121. See Randolph, *supra* note 33, at 72.

122. *Id.*

123. *United States v. Richards*, 67 F.3d 1531, 1535 (10th Cir. 1995) (quoting *LEARNED HAND*, *HOW FAR IS A JUDGE FREE IN RENDERING A DECISION?* in *THE SPIRIT OF LIBERTY* 103, 106 (Irving Dilliard ed., 1952)).

124. See *supra* notes 118-21.

125. *Looking It Up*, *supra* note 8, at 51.

126. See *id.*

127. Bradley C. Karkkainen, *Plain Meaning: Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 407 (1994).

128. See Costello, *supra* note 47, at 61.

reports and floor debate should be reversed.<sup>129</sup> Thus, in a 1995 dissent Justice Scalia wrote:

Even if legislative history were a legitimate and reliable tool of interpretation (which I shall assume in order to rebut the Court's claim); and even if it could appropriately be resorted to when the enacted text is as clear as this . . . here it shows quite the opposite of what the Court says.<sup>130</sup>

And:

There is little fear, of course, that giving no effect to the relevant portions of the Committee Reports will frustrate the real life expectations of a majority of the members of Congress. If they read and relied on such tedious detail on such an obscure point . . . the Republic would be in grave peril.<sup>131</sup>

Justice Scalia argues that the Court should rely on plain meaning unless, by doing so, it produces patently absurd results.<sup>132</sup> One critic of this approach raises the question: "Does legislative history somehow become reliable in the event of an absurd statutory text, while remaining unreliable in other circumstances?"<sup>133</sup> Karkkainen argues that if legislative history can set us straight in the event of an absurdity, perhaps it can also prevent a simple misreading of the statute.<sup>134</sup> "For Justice Scalia, the response must be that in the event of absurdity, all bets are off . . ."<sup>135</sup> In 1991, in *Wisconsin Public Intervenor v. Mortier*,<sup>136</sup> seven other justices signed Justice White's majority opinion in which he pointedly rejected Justice Scalia's critique of legislative history and insisted that courts would continue to use legislative history.<sup>137</sup> Another critic points out the problem of reliability and subjectivity in Justice Scalia's approach.

[H]is interpretation is limited only by the range of his intellect and common sense. Although intellect and common sense may be valuable attributes in the field of statutory interpretation, they are no substitute for the words of the statute as contextualized by the legislative history. Fidelity to a broad plain-meaning approach that expands and circumvents

---

129. See *id.* at 41.

130. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2426-27 (1995) (Scalia, J., dissenting).

131. *Id.* at 2429 (Scalia, J., dissenting).

132. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect — at least in the absence of a patent absurdity.").

133. Karkkainen, *supra* note 127, at 422.

134. See *id.*

135. *Id.*

136. 501 U.S. 597 (1991).

137. See *id.* at 610 n.4 (noted by Ross, *supra* note 55, at 574).

approved text and allows substitution of personal context is also unreliable.<sup>138</sup>

### *Other Justices*

Justice Scalia has led the textualist movement, claiming that the plain meaning of the statute should be given effect. Justices Kennedy and Thomas are adherents to this point of view also. In *Metropolitan Stevedore Co. v. Rambo*,<sup>139</sup> Justice Kennedy said: "Given that the language of § 22 and the structure of the Act itself leave little doubt as to Congress' intent, any argument based on legislative history is of minimal, if any, relevance."<sup>140</sup> Justices Scalia, Kennedy, and Thomas often rely on textualism to justify their decisions, but an equally conservative Chief Justice Rehnquist does not hesitate to rely on legislative history to support a specific result.<sup>141</sup> "He has generally declined to join in Justice Scalia's diatribes against legislative history, and has frequently associated himself with opinions that Justice Scalia finds objectionable."<sup>142</sup>

Justice Breyer encourages the careful use of legislative history in interpreting statutes. He notes that his arguments are more pragmatic than theoretical.<sup>143</sup> "[L]egislative history helps appellate courts reach interpretations that tend to make the law itself more coherent, workable, or fair."<sup>144</sup> "Legislative history helps a court understand the purpose of a statute."<sup>145</sup> Justice Stevens also has emerged "as a forceful defender of the search for legislative intent and the use of legislative history."<sup>146</sup>

138. Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 125 (1995).

139. 115 S. Ct. 2144 (1995).

140. *Id.* at 2149. Justice Kennedy was referring here to committee reports accompanying three different amendments to section 22 of the Longshore and Harbor Workers Compensation Act.

141. See Ernest Gellhorn, *Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 760 (1995).

142. Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 653 (1994). Merrill cited to Rehnquist's opinions in: *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (plurality opinion); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991); *Moskal v. United States*, 498 U.S. 103 (1990); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989). "Thus, the most that can be inferred . . . is that Chief Justice Rehnquist cares less about the controversy over the use of legislative history than Justice Scalia does." Merrill, *supra*, at 653.

143. See Breyer, *supra* note 30, at 847.

144. *Id.*

145. *Id.* at 848.

146. See Merrill, *supra* note 102, at 357. However, Justice Stevens is not doctrinaire. Notice his comment in *Hubbard v. United States*, 115 S. Ct. 1754 (1995):

Although the historical evolution of a statute — based on decisions by the entire Congress — should not be discounted for the reasons that may undermine confidence in the significance of excerpts from congressional debates and committee reports, a historical analysis normally provides less guidance to a statute's meaning than its final text.

*Id.* at 1759.

*Statistics (1995)**Supreme Court*

Judge Wald pointed out that the Supreme Court checked on legislative history in almost every statutory case decided in 1981.<sup>147</sup> In 1989, the Court decided ten out of about sixty-five statutory cases without any reference to legislative history at all, although in several of those ten cases a dissent or concurrence did cite to legislative history.<sup>148</sup> In the 1990 Term, the Court decided nineteen of approximately fifty-five statutory cases without the use of legislative history.<sup>149</sup> In the 1992 Term, the Court decided six of forty-one statutory cases without the use of legislative history.<sup>150</sup> By my count and analysis for the year 1995, the Supreme Court decided twenty-two out of fifty-one statutory cases without the use of legislative history. Thus, our percentages of statutory cases decided *without* the use of legislative history for those four years:

1989	15.5%
1990	34.6%
1992	14.7%
1995	43.1%

Justice Scalia has been on the Court since 1986, so, while his views on the worth and uses of legislative history have apparently had an effect, no clear trend is evident.

Thomas Merrill commented: "A better explanation for the triumph of textualism . . . lies not so much in Justice Scalia's persuasiveness as in his persistence."<sup>151</sup> Merrill says that the critical factor is Justice Scalia's practice of refusing to join any part of another Justice's opinion that relies on legislative history and that Justice Thomas has taken up a similar stance.<sup>152</sup> If that practice was true in the 1992 Term, it certainly was not true in 1995. In 1995, the Court handed down eighty-two opinions. Of these, fifty-one dealt with statutory interpretation. There were eleven opinions in which Justice Scalia or Justice Thomas or, more usually, both joined another Justice's opinion even though he or she used legislative history to bolster his or her opinion.<sup>153</sup>

147. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197 (1983) ("Not once last Term was the Supreme Court sufficiently confident of the clarity of statutory language *not* to double check its meaning with the legislative history.").

148. See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 288, 298-99 (1990).

149. See Breyer, *supra* note 30, at 846.

150. See Wald, *supra* note 67, at 49. However, statistics vary wildly for the 1992 Term. Thomas Merrill says there were sixty-six statutory interpretation cases in the 1992 Term, and forty-one of them (62%) did not mention legislative history. He also said that only twelve of the cases (18%) made substantial use of legislative history. See Merrill, *supra* note 102, at 355.

151. Merrill, *supra* note 102, at 365.

152. See *id.*

153. *Thompson v. Keohane*, 116 S. Ct. 457 (1995) (Ginsburg, J.) (Justice Scalia joined); *Field v.*

Another aspect to the analysis is the Court's willingness to find a statutory "plain meaning" compared to its willingness to consult legislative history. In this context, William Eskridge worked up an interesting table for the Supreme Court.<sup>154</sup>

	1988 Term	1987 Term	1986 Term	1995 Year
Number of Substantial Statutory Interpretation Opinions	83	81	82	34
Court Finds Statutory Plain Meaning	32	37	28	12
Legislative History Used to Confirm Plain Meaning	11	15	18	20
Legislative History Used to Get Around Apparent Meaning	4	3	7	2

The 1995 figures are based on my analysis. The one notable difference is that in 1995, as a percentage, the Court used legislative history much more to confirm plain meaning than in the three terms Professor Eskridge analyzed.<sup>155</sup>

Finally, it is of some interest to note how often the different justices cited to legislative history in 1995 and to see to what kinds of legislative history materials they cited. (Opinions include majority, concurrences, and dissents.)

---

Mans, 116 S. Ct. 437 (1995) (Souter, J.) (Justice Thomas joined); *Libretti v. United States*, 116 S. Ct. 356 (1995) (O'Connor, J.) (Justices Scalia and Thomas joined); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (Kennedy, J.) (Justices Scalia and Thomas joined); *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144 (1995) (Kennedy, J.) (Justices Scalia and Thomas joined); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995) (Souter, J.) (Justices Scalia and Thomas joined); *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995) (Rehnquist, J.) (Justices Scalia and Thomas joined); *Heintz v. Jenkins*, 514 U.S. 291 (1995) (Breyer, J.) (Justices Scalia and Thomas joined); *Shalala v. Whitecotton*, 514 U.S. 268 (1995) (Souter, J.) (Justices Scalia and Thomas joined); *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995) (Breyer, J.) (Justices Scalia and Thomas joined); *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995) (Breyer, J.) (Justices Scalia and Thomas joined).

154. Eskridge, *supra* note 48, at 657. Eskridge does not explain why his totals do not add up, i.e., for the 1988 term 32 plus 11 plus 4 does not equal 83, etc.

155. It is quite possible, however, that Professor Eskridge and I counted the use of legislative history differently. For me, if a committee report or a hearing or floor debate was cited even once in connection with the interpretation of a statute, I counted the case as one in which legislative history was used to confirm plain meaning. Eskridge's methodology was not clear. *See id.* at 656-57.

	Opinions	Cites to Reports	Cites to Hearings	Cites to Floor Debate	Cites to Other Materials	Total Cites
Breyer	19	12	4	2	1	19
Ginsburg	25	5	1	0	0	6
Kennedy	17	5	1	0	0	6
O'Connor	29	3	0	1	0	4
Rehnquist	15	2	0	0	0	2
Scalia	26	2	0	1	0	3
Souter	20	3	0	1	1	5
Stevens	36	9	1	3	0	13
Thomas	26	2	0	0	0	2
TOTALS		43	7	8	2	60

Disregarding the two cites to the other materials, 74% of the legislative history cites are to reports, 12% of the cites are to hearings, and 14% of the cites are to floor debate (the *Congressional Record*). The only baseline I know of for comparison is the Carro & Brann study,<sup>156</sup> which covered the years 1938-1979. In that study for the three main types of legislative history materials, reports made up 57% of the total, hearings made up 17%, and floor debate made up 26%.<sup>157</sup> In the Supreme Court in 1995, cites to committee reports were quite high as a percentage — despite Justice Scalia's mistrust of their reliability and usefulness.

### *Major Controversies*

One of the more spirited debates in 1995 over the uses of legislative history occurred in the case of *Gustafson v. Alloyd Co.*<sup>158</sup> It is particularly interesting because Justice Kennedy, something of a textualist, wrote the majority opinion in the five-to-four decision, and he was opposed by the diverse group of Justices Thomas, Scalia, Ginsburg, and Breyer. Justice Kennedy held that the term "prospectus" in section 12(2) of the Securities Act of 1933, which gives buyers of securities the express right of rescission against sellers who make material misstatements or omissions by means of the prospectus, referred to a document that describes a public offering of securities by an issuer or controlling shareholder — not private agreements to sell securities.<sup>159</sup> Citing to a House Report, he noted that the primary innovation of the 1933 Act was

156. Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982).

157. See *id.* at 304 tbl. II.

158. 115 S. Ct. 1061 (1995).

159. See *id.* at 1066-74.

the creation of federal duties in connection with public offerings.<sup>160</sup> He also directly confronted the dissenters:

In the name of a plain meaning approach to statutory interpretation, the dissents discover in the Act two different species of prospectuses: formal . . . and informal prospectuses . . . . Nowhere in the statute, however, do the terms "formal prospectus" or "informal prospectus" appear. Instead, the Act uses one term — "prospectus" — throughout. . . . The dissenting opinions' resort to terms not found in the Act belies the claim of fidelity to the text of the statute.<sup>161</sup>

Referring again to House Report No. 73-85, Justice Kennedy noted that the use of the term prospectus to refer to public solicitations explains as well Congress' decision in section 12(2) of the Act to grant buyers a right to rescind without proof of reliance.<sup>162</sup> Justice Kennedy also cited to *United States v. Naftalin*,<sup>163</sup> which relied upon a Senate Report showing that Congress decided upon a deliberate departure from the general scheme of the Act in this one instance, and "made abundantly clear" its intent that section 17(a) have broad coverage.<sup>164</sup> "The legislative history of the Act concerning the precise question presented supports our interpretation with much clarity and force."<sup>165</sup>

Justice Thomas in his dissent, joined by Justices Scalia, Ginsburg, and Breyer, said: "Unfortunately, the majority has decided to interpret the word 'prospectus' . . . by turning to sources outside the four corners of the statute, rather than by adopting the definition provided by Congress."<sup>166</sup> And: "Our mandate to interpret statutes does not allow us to recast Congress' handiwork so completely."<sup>167</sup> Justice Thomas, in addition, said that the legislative history relied on by the majority and by the Court in *Naftalin* does not support the conclusion that Congress wanted to extend section 17(a) to secondary sales.<sup>168</sup>

Justice Ginsburg in her dissent, joined by Justice Breyer, said: "Though the Court cites legislative history to show Congress' intent to follow, rather than depart from, the British statute, these sources suggest an intention to afford at least as much protection from fraud as the British statute provides."<sup>169</sup> Justice Ginsburg noted that the House Conference Report, which explains the Act in its final form, describes section 12(2) in broad terms and nowhere suggests that the provision is limited to public of-

---

160. See *id.* at 1068 (quoting H.R. REP. NO. 73-85, at 7 (1933)).

161. *Id.* at 1068-69.

162. See *id.* at 1070.

163. 441 U.S. 768 (1979).

164. See *Gustafson*, 115 S. Ct. at 1071 (citing *Naftalin*, 441 U.S. at 778 (citing S. REP. NO. 73-47, at 4 (1933))).

165. *Id.* at 1072 (citing H.R. REP. NO. 73-85 (1933)).

166. *Id.* at 1074 (Thomas, J., dissenting).

167. *Id.* at 1076 (Thomas, J., dissenting).

168. See *id.* at 1078 n.2 ("The passage cited by the majority and by *Naftalin*, S. Rep. 73-47 (1933) . . . was unrelated to § 17(a), and instead discussed a Senate proposal which was replaced by the House bill as the basis for the 1933 Act.").

169. *Id.* at 1081 n.3 (Ginsburg, J., dissenting) (referring to H.R. REP. NO. 73-85 (1933)).



ferings.<sup>170</sup> Finally, Justice Ginsburg said: "I do not share the Court's view that Report No. 85 speaks with clarity and specificity to the question at hand — § 12(2)'s scope."<sup>171</sup>

The second major case in 1995 involving great controversy over the uses of legislative history was *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>172</sup> In that case parties who were allegedly dependent on the forest product industry brought an action against the Secretary of the Interior and against the Fish and Wildlife Service director, challenging a regulation promulgated by the Secretary under the Endangered Species Act (ESA). Justice Stevens wrote the opinion for the six-justice majority (Justice O'Connor concurring); Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, wrote an extremely vigorous dissent. Justice Scalia commented generally: "Even if legislative history were a legitimate and reliable tool of interpretation . . . and even if it could appropriately be resorted to when the enacted text is as clear as this, here it shows quite the opposite of what the Court says."<sup>173</sup> Justice Stevens held that the Secretary's definition of "harm," within the meaning of the ESA provision defining "take," as including "significant habitat modification or degradation that actually kills or injures wildlife" was reasonable.<sup>174</sup>

Justice Stevens noted that logging activities would have the effect of detrimentally changing the natural habitat of two endangered species.<sup>175</sup> He noted that "under respondents' view of the law, the Secretary's only means of forestalling that grave result — even when the actor knows it is certain to occur — is to use his . . . authority to purchase the lands on which the survival of the species depends."<sup>176</sup> He noted that the House Conference Report said that "to be subject to the Act's criminal penalties or the more severe of its civil penalties one must 'knowingly' violate the Act or its implementing regulations. Congress added 'knowingly' in place of 'willfully' in 1978 to make 'criminal violations of the act a general rather than a specific intent crime.'"<sup>177</sup>

Justice Stevens said that "the Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of 'harm' but they make clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions."<sup>178</sup> He noted that the Senate Report stressed that "[t]ake is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."<sup>179</sup> Justice Scalia dismissed this statement from the Senate Report as an "empty flourish" and said that "to the effect

---

170. See *id.* at 1081 (Ginsburg, J., dissenting) (quoting H.R. CONF. REP. NO. 73-152, at 26-27 (1933)).

171. *Id.* at 1081 n.4 (Ginsburg, J., dissenting).

172. 115 S. Ct. 2407 (1995).

173. *Id.* at 2426-27 (Scalia, J., dissenting) (citation omitted).

174. See *id.* at 2415.

175. See *id.* at 2412.

176. *Id.*

177. *Id.* at 2412 n.9 (quoting H.R. CONF. REP. NO. 95-1804, at 26 (1978)).

178. *Id.* at 2416.

179. *Id.* (quoting S. REP. NO. 93-307, at 7 (1973)).

that 'this statute means what it means all the way' counts for little even when enacted into the law itself."<sup>180</sup> Justice Stevens also noted: "The House Report stated that 'the broadest possible terms' were used to define restrictions on takings [and it] underscored the breadth of the 'take' definition by noting that it included 'harassment, whether intentional or not.'"<sup>181</sup> Justice Stevens commented that these Committee Report comments were "ignored in the dissent's welcome but selective foray into legislative history."<sup>182</sup>

Justice Stevens noted that neither of the two endangered species bills included the word "harm" in the definition of "take," "although the definitions otherwise closely resembled the one that appeared in the bill as ultimately enacted."<sup>183</sup> Justice Stevens noted that "Senator Tunney, the floor manager of the bill in the Senate, subsequently introduced a floor amendment that added 'harm' to the definition, noting that this and accompanying amendments would 'help to achieve the purposes of the bill.'"<sup>184</sup> Justice Stevens commented: "An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading."<sup>185</sup> Justice Scalia responded that Justice Stevens had inflated the importance of Senator Tunney's statement.<sup>186</sup>

Justice Stevens said that respondents made much of the fact that the Commerce Committee removed the phrase "the destruction, modification, or curtailment of [the] habitat or range" from the "take" definition before the bill went to the floor.<sup>187</sup> Justice Scalia said that this removal of the phrase was "far more pertinent" than the Senate floor manager's introduction of an amendment that added the word "harm" to the definition of "take."<sup>188</sup> Justice Stevens responded: "We do not find [the removal of the phrase] especially significant. The legislative materials contain no indication why the habitat protection provision was deleted. That provision differed greatly from the regulation at issue today."<sup>189</sup> He went on to say: "We do not believe the Senate's unelaborated disavowal of the provision in S. 1983 undermines the reasonableness of the more moderate habitat protection in the Secretary's 'harm' regulation."<sup>190</sup> Justice Stevens noted that the respondents relied heavily on their argument that Congress intended the acquisition provision to be the ESA's remedy for habitat modification on a floor statement by Senator Tunney.<sup>191</sup> Justice Scalia had said Senator Tunney's

---

180. *Id.* at 2427 (Scalia, J., dissenting).

181. *See id.* at 2416 (citing H.R. REP. NO. 93-412, at 11, 15 (1973)).

182. *Id.*

183. *See id.* (citing Hearings on S. 1592 and S. 1983 before the Subcomm. on Env't of the Senate Comm. on Commerce, 93d Cong., 7, 27 (1973)).

184. *Id.* at 2416-17 (citing 119 Cong. Rec. 25,683 (1973)).

185. *Id.* at 2417.

186. *See id.* at 2427 (Scalia, J., dissenting).

187. *Id.* at 2417 (citing 119 CONG. REC. 25,663 (1973)).

188. *Id.* at 2427 (Scalia, J., dissenting).

189. *Id.* at 2417.

190. *Id.* (footnote omitted).

191. *See id.* at 2417 n.19 (citing 119 CONG. REC. 25,669 (1973) (statement of Sen. Tunney)). Senator Tunney stated:

statement was "direct evidence of what those who brought the legislation to the floor thought it meant — evidence as solid as any ever to be found in legislative history, but which the Court banishes to a footnote."<sup>192</sup> Justice Scalia went on to say that both the Senate and House floor managers of the bill explained it in terms "which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program."<sup>193</sup> He said that the floor managers viewed habitat modification and takings as different problems, addressed by different provisions of the Act: "The [majority] really has no explanation for these statements."<sup>194</sup> In that same footnote 19, Justice Stevens said that neither of the floor managers' statements suggested that land acquisition would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of the statute.<sup>195</sup> Justice Scalia responded:

That is to say, the statements are not as bad as they might have been. Little in life is. They are, however, quite bad enough to destroy the Court's legislative-history case, since they display the clear understanding (1) that habitat modification is separate from "taking," and (2) that habitat destruction on private lands is to be remedied by public acquisition.<sup>196</sup>

Justice Stevens went on to say that the history of the 1982 amendment that gave the Secretary authority to grant permits for "incidental" takings provided further support for his reading of the Act.<sup>197</sup> Justice Stevens noted that the House Report expressly stated that "[b]y use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity."<sup>198</sup> He said that the reference to the foreseeability of incidental takings undermined respondents' argument

---

Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs . . . . Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species . . . .

119 CONG. REG. at 25,669.

192. *Id.* at 2427 (Scalia, J., dissenting) (emphasis omitted).

193. *Id.* (Scalia, J., dissenting).

194. *Id.* (Scalia, J., dissenting).

195. *See id.* at 2417 n.19.

196. *Id.* at 2427 (Scalia, J., dissenting).

197. *See id.* at 2417.

198. *Id.* (quoting H.R. REP. NO. 97-567, at 31 (1982)).

that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals.<sup>199</sup>

Indeed, Congress had habitat modification directly in mind: both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat.<sup>200</sup>

Justice Scalia said the 1982 permit provision did not support the regulation although he acknowledged that the Senate Report and House Conference Committee Report "clearly contemplate that it will enable the Secretary to permit environmental modification."<sup>201</sup> Justice Scalia argued that the text of the amendment could not possibly bear the asserted meaning when placed within the context of an act that must be interpreted not to prohibit private environmental modification: "The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text."<sup>202</sup>

Many other Supreme Court cases in 1995 dealt with legislative history as well. See Appendix A where these cases are detailed individually.

### *Tenth Circuit*

One commentator has noted that the intense scholarly focus on Supreme Court opinions exaggerates the role of the Supreme Court as the leading institution in statutory analysis.<sup>203</sup> In large part this is a matter of numbers. In 1995 the Supreme Court handed down eighty-two opinions. Fifty-one of these opinions dealt particularly with statutes, and twenty-nine of these utilized legislative history. The Tenth Circuit alone in 1995 handed down 1672 opinions of which 449 were published opinions. Of the 449, 179 dealt particularly with statutes, and forty-four utilized legislative history. Based on only one year's worth of opinions from only one circuit, firm conclusions about lower federal court uses of legislative history are impossible. One can only say that in 1995 about 25% of all the Tenth Circuit decisions dealing particularly with statutes used legislative history to help interpret those statutes. Whereas in 1995 for the Supreme Court about 57% of the decisions involving statutes used legislative history to help interpret those statutes. Still, forty-four decisions in one year from one circuit did use legislative history materials — and only one judge (Judge Baldock) was noticeably ambivalent about their use.

---

199. *See id.* at 2417-18.

200. *Id.* at 2418 (citing S. REP. NO. 97-418, at 10 (1982) and H.R. CONF. REP. NO. 97-835, at 30-32 (1982)).

201. *Id.* at 2428 (Scalia, J., dissenting) (citing S. REP. NO. 97-418, at 10 (1982) and H.R. CONF. REP. NO. 97-835, at 30-32 (1982)).

202. *Id.* (Scalia, J., dissenting).

203. *See* Nehf, *supra* note 28, at 6.

Note the kinds of legislative history materials the Tenth Circuit judges cited to in 1995.

Reports	Hearings	Floor Debate	Legislative History Generally	Other
34	2	7	12	4

Disregarding the twelve nonspecific references to legislative history and the four cites to other materials, 79% of the cites are to reports (Supreme Court: 74%), 5% of the cites are to hearings (Supreme Court: 12%), and 16% of the cites are to floor debate (Supreme Court: 14%).

Thus, Judge McKay cited *Thornburg v. Gingles*<sup>204</sup> as authority for its proposition that "[c]ommittee reports accompanying ultimately enacted bills are a favored authoritative source of legislative history."<sup>205</sup> Judge McKay stated:

Where the literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope. . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention.<sup>206</sup>

Judge Tacha said: "In determining the meaning of a statute, we look at not only the statute itself but also at the larger statutory context. We may ascertain the intent of Congress through statutory language and legislative history."<sup>207</sup> Judge Kelly also said: "We may ascertain the intent of Congress through statutory language and legislative history."<sup>208</sup>

However, Justice Scalia's views on the uses of legislative history seem to have had some impact on at least one Tenth Circuit judge, namely Judge Baldock. In 1995 Judge Baldock did not specifically note Justice Scalia and his views, but Judge Baldock cited to dictionaries more than all the other Tenth Circuit judges combined, and he also addressed directly the importance of the plain meaning view of statutory interpretation. Thus: "In statutory interpretation we look to the plain language of the statute and give effect to its meanings."<sup>209</sup> And: "We will not restrict the plain

204. 478 U.S. 30 (1986) (Brennan, J.).

205. *United States v. Gonzales*, 65 F.3d 814, 821 n.4 (10th Cir. 1995) (citing *Thornburg*, 478 U.S. at 43 n.7).

206. *Id.* at 820 (quoting *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989)) (omission in original).

207. *Osborne v. Babbitt*, 61 F.3d 810, 812 (10th Cir. 1995) (quoting *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir. 1995)).

208. *Utah v. Babbitt*, 53 F.3d 1145, 1148 (10th Cir. 1995).

209. *Slamans v. First Nat'l Bank & Trust Co.*, 69 F.3d 468, 473 (10th Cir. 1995).

meaning of the language chosen by Congress absent clearly expressed legislative intent to the contrary."<sup>210</sup> And: "[W]e must look beyond the literal language of the [sentencing] guideline if reliance on that language could defeat the plain purpose of the statute."<sup>211</sup>

Judge Baldock, however, in 1995 was something of an anomaly on the Tenth Circuit, and even he, on occasion, utilized legislative history. Also, other Tenth Circuit judges mouthed platitudes about the importance of the "plain meaning" of a statute. See Appendix B for specific uses by Tenth Circuit judges of legislative history materials in 1995.

### Conclusion

The theories of purposivism and intentionalism, both of which use legislative history to interpret statutes, continue to play an important role. Committee reports, despite Justice Scalia's doubts about their validity, continue to be cited to much more than other kinds of legislative history — both by the Supreme Court and by the Tenth Circuit.

With respect to agency interpretation of statutes, the *Chevron* test is alive and well: If the statute is plain on its face, the Supreme Court and the Tenth Circuit do not turn to the agency for help. If the statute is not clear, then these courts, by and large, give deference to the agency's interpretation.

Textualists in their search for plain meaning like to rely on ordinary dictionaries since their legal philosophy, by and large, prevents them from looking at legislative history. Dictionaries would, one supposes, give the ordinary meaning of everyday words. However, in their indiscriminate and seemingly arbitrary use of dictionaries, textualists leave themselves open to criticism. At the very least, those judges who use a dictionary to define a word should make a case why that particular dictionary is relevant, perhaps in a footnote. This surely makes sense except for those dictionaries which are very well known and very reputable such as the latest edition of *Black's Law Dictionary* and the *Oxford English Dictionary* (2d ed. 1989).

Although more studies such as this will be needed, it may be significant that 1995 saw the lowest use of legislative history by the Supreme Court (57% in cases dealing with statutory interpretations) of any of the four studies in the last eight years. Also, where legislative history was used in 1995, it was almost always to confirm the plain meaning of the statute — clearly more so than in the three other studies. Justices Breyer and Stevens had a total of thirty-two cites between them in 1995 (see table on p. 594), while Justices Thomas and Scalia had only five between them — and then almost always to rebut other legislative history interpretations.

More studies are needed on the use of legislative history by circuit courts. My analysis of the Tenth Circuit in 1995 is only a beginning. One can only say that this particular circuit in this particular year did use legislative history materials to some significant degree although nowhere near as great on a percentage basis as the

---

210. *Johns v. Stewart*, 57 F.3d 1544, 1555 (10th Cir. 1995).

211. *United States v. Frazier*, 53 F.3d 1105, 1112 (10th Cir. 1995).

Supreme Court. Still, this one circuit had only one less reference to legislative history materials than did the Supreme Court in 1995 (fifty-nine compared to sixty).

Using legislative history to interpret statutes continues, and suggestions for improvement also continue. For example:

First, the Court should devote more of its energy to analyzing statutory *texts*, through structural arguments, analogues from other statutes, and consideration of consequences of an interpretation for the statute as a whole. . . . Second, the Court should develop clear statement rules . . . that obviate recourse to legislative history in a greater variety of settings. . . . [W]here a statutory text is clear, and where that clarity is consistent with the statutory structure and the apparent statutory policy, the Court should not delve into legislative history. Third, the Court should be more critical of the legislative history it uses, especially when the statute is an old one and the immediate concerns of the legislative history have been overtaken by changed circumstances.<sup>212</sup>

All that being said, however, the use of legislative history by the courts will no doubt continue. Lawyers will continue to use in their briefs what they can find. Law clerks for judges, except when given strict orders not to, will also seek to dig out what is available. If anything, access to legislative materials is easier now with much more materials on Lexis and Westlaw. Moderation and common sense are the keys. A hardline position on either side is unhelpful. To use legislative history uncritically is unwise. To never use legislative history, even when obviously relevant and valid, is equally unwise.

---

212. Eskridge, *supra* note 48, at 625.

## APPENDIX A

*Other 1995 Supreme Court Cases Dealing with Legislative History*

In *NLRB v. Town & Country Electric, Inc.*,<sup>213</sup> Justice Breyer, for the Supreme Court, held that a worker may be a company's "employee" within the terms of the National Labor Relations Act even if, at the same time, a union pays that worker to help the union organize the company.<sup>214</sup> To support a broad meaning of the word "employee," he cited to one Senate Committee Report and to four House Committee Reports: "And, insofar as one can infer purpose from Congressional reports and floor statements, those sources too are consistent with the Board's broad interpretation of the word."<sup>215</sup>

In *United States v. Lopez*,<sup>216</sup> Chief Justice Rehnquist, for the majority, held that the Gun-Free School Zones Act, making it a federal offense for individuals knowingly to possess a firearm near a school, exceeded Congress' Commerce Clause authority, since the possession of a gun in a school zone was not economic activity that substantially affected interstate commerce.<sup>217</sup> In his concurrence, Justice Kennedy cited to 1963 Senate Committee on Commerce hearings and said: "[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance."<sup>218</sup> Justice Breyer, in his dissenting opinion, cited various hearings and one House and one Senate Report in an effort to show the extremely serious problem of guns in and around schools and how the decline in the nation's schools affects trade balances.<sup>219</sup>

In *Stone v. INS*,<sup>220</sup> Justice Kennedy, for the majority, said that a timely motion for reconsideration of a Board of Immigration Appeals decision does not toll the running of the ninety-day period for review of final deportation orders.<sup>221</sup> Justice Breyer in dissent, joined by Justices O'Connor and Souter, cited to a House Conference Report: "The legislative history is . . . silent on the matter . . ."<sup>222</sup>

In *Heintz v. Jenkins*,<sup>223</sup> a debtor brought a Fair Debt Collection Practices Act suit against an attorney representing a creditor in litigation. The debtor alleged false representations in the attorney's correspondence. Justice Breyer, writing for the

213. 116 S. Ct. 450 (1995).

214. *See id.* at 453-54.

215. *Id.* at 454 (citing H.R. REP. NO. 80-245 (1947); S. REP. NO. 74-573 (1935); H.R. REP. NO. 74-969 (1935); H.R. REP. NO. 74-972 (1935); H.R. REP. NO. 74-1147 (1935)).

216. 115 S. Ct. 1624 (1995).

217. *See id.* at 1631.

218. *Id.* at 1639 (Kennedy, J., concurring) (citing *Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong. pts. 1-3 (1963)).

219. *See id.* at 1659-60 (Breyer, J., dissenting) (citing S. REP. NO. 100-222, at 2 (1987); H.R. REP. NO. 98-6, at 19 (1983)).

220. 115 S. Ct. 1537 (1995).

221. *See id.* at 1544-45.

222. *Id.* at 1550 (Breyer, J., dissenting) (citing H.R. CONF. REP. NO. 101-955, at 132-33 (1990)).

223. 115 S. Ct. 1489 (1995).



Court, held that the Act applied to lawyers regularly engaged in consumer debt-collection litigation on behalf of creditor clients.<sup>224</sup> When Congress considered the Act, Justice Breyer said that some congressmen expressed fear that failure to pass the Act would limit lawyers' "ability to contact third parties in order to facilitate settlements" and "could very easily interfere with a client's right to pursue judicial remedies."<sup>225</sup> These congressmen proposed alternative language designed to keep litigation activities outside the Act's scope, but that language was not enacted.<sup>226</sup>

In *Plaut v. Spendthrift Farm*,<sup>227</sup> securities fraud plaintiffs moved to reinstate their time-barred Securities Exchange Act section 10(b) claims. Justice Scalia, writing for the Court, held that Securities Exchange Act section 27A(b) violated constitutional separation of powers principles by instructing federal courts to reopen final judgments.<sup>228</sup> Justice Breyer, in his concurrence, noted also that section 27A(b) lacks generality, for it applies only to a few individual instances.<sup>229</sup> Justice Stevens, however, dissented, arguing that this section could apply retroactively without violating constitutional principles.<sup>230</sup> He cited to a House Report which noted that the habeas statute replaced a common-law writ and necessarily applied retroactively.<sup>231</sup> He also noted the remarks of Senator Bryan on the floor of the Senate: "All we seek . . . is to give the victims [of securities fraud] a fair day in court."<sup>232</sup>

In *Qualitex Co. v. Jacobson Products Co.*,<sup>233</sup> Justice Breyer, for the Court, held that no special legal rule prevents color alone from serving as a trademark and that the green-gold color of a manufacturer's dry cleaning press pads could be registered as a trademark.<sup>234</sup> Citing to Senate Reports, he noted that trademark law discourages those who hope to sell inferior products by capitalizing on a consumer's inability to evaluate quickly the quality of an item offered for sale,<sup>235</sup> and the Lanham Act significantly changed and liberalized the common law to "dispense with mere technical prohibitions."<sup>236</sup> He also noted Senator DeConcini's remarks on the floor that his bill was based on the Trademark Commission Report that "the terms 'symbol, or device' . . . not be deleted or narrowed to preclude registration of

---

224. See *id.* at 1490.

225. *Id.* at 1492 (citing H.R. REP. NO. 99-405, at 11 (1985) (dissenting views of Rep. Hiler)).

226. See *id.* (citing H.R. REP. NO. 99-405, at 11 (1985)).

227. 115 S. Ct. 1447 (1995).

228. See *id.* at 1456.

229. See *id.* at 1465 (Breyer, J., concurring) (citing *Hearings on H.R. 3185 before the Subcomm. on Telecommunications & Finance of the House Comm. on Energy & Commerce*, 102d Cong. 3-4 (1991)).

230. See *id.* at 1466 (Stevens, J., dissenting).

231. See *id.* at 1472 (Stevens, J., dissenting) (citing H.R. REP. NO. 80-308 (1947)).

232. *Id.* at 1475 (Stevens, J., dissenting) (citing 137 CONG. REC. S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan)).

233. 115 S. Ct. 1300 (1995).

234. See *id.* at 1302-03.

235. See *id.* at 1303-04 (citing S. REP. NO. 100-115, at 4 (1988)).

236. *Id.* at 1307 (citing S. REP. NO. 79-1333, at 3 (1946)).

such things as a color, shape, smell, sound, or configuration which functions as a mark."<sup>237</sup>

In *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*,<sup>238</sup> Justice Breyer, writing for the Court, said that the legislative history of the Multiemployer Pension Plan Amendments Act did not demonstrate that Congress expressly rejected the idea of a funding gap between the valuation date at the end of the plan year before withdrawal and the beginning of the year following withdrawal.<sup>239</sup> Citing to a House Report, he noted that ERISA required employers to make contributions that would produce pension-plan assets sufficient to meet future vested pension liabilities; it mandated termination insurance to protect workers against a plan's bankruptcy; and, if a plan became insolvent, it held any employer who had withdrawn from the plan during the previous five years liable for a fair share of the plan's underfunding.<sup>240</sup> Citing to four different versions of the bill, House Bill 3904, Justice Breyer noted that the valuation date and interest-accrual date changed in each version of the bill, which dispelled the notion that the final version should be viewed primarily as a rejection of the funding gap found in the original bill.<sup>241</sup>

In *Allied-Bruce Terminix Cos. v. Dobson*,<sup>242</sup> Justice Breyer, writing for the Court, held that the Federal Arbitration Act section making enforceable a written arbitration provision in a contract evidencing a transaction involving commerce was written broadly, extending the Act's reach to the limits of Congress' Commerce Clause power.<sup>243</sup> He said that the Act's legislative history indicated an expansive congressional intent and cited to a House Report and to joint hearings.<sup>244</sup> Citing to additional hearings, Justice Breyer noted that the Act's supporters urged Congress to model the Act after a New York statute that made enforceable a written arbitration provision "in a written contract."<sup>245</sup> He also cited to a Senate Report, noting that Congress, when enacting the Federal Arbitration Act, "had the needs of consumers, as well as others, in mind."<sup>246</sup>

In *Thompson v. Keohane*,<sup>247</sup> Justice Ginsburg for the Court held that state-court determination as to whether a suspect was "in custody" at the time of interrogation for purposes of *Miranda* was not entitled to statutory presumption of correctness during federal habeas corpus review, but was a mixed question of law and fact

---

237. *Id.* (citing 133 CONG. REC. 32,812 (1987) (statement of Sen. DeConcini)).

238. 115 S. Ct. 981 (1995).

239. *See id.* at 991-92.

240. *See id.* at 985 (citing H.R. REP. NO. 96-869, pt. 1, at 54-55 (1980)).

241. *See id.* at 991-92.

242. 115 S. Ct. 834 (1995).

243. *See id.* at 836.

244. *See id.* at 839-40 (citing *Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924); H.R. REP. NO. 68-96, at 1 (1924)).

245. *Id.* at 842 (citing *Hearing on S. 4213 and 4214 before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 2 (1923) (testimony of Charles L. Bernheimer)).

246. *Id.* (citing H.R. REP. NO. 97-542, at 13 (1982)).

247. 116 S. Ct. 457 (1995).

warranting independent review by a federal habeas court.<sup>248</sup> She noted that 28 U.S.C. § 2254 "governs federal habeas corpus proceedings instituted by persons in custody pursuant to the judgment of a state court."<sup>249</sup> She also noted that the list of circumstances warranting an evidentiary hearing in a federal habeas proceeding was set out in a House Report.<sup>250</sup>

In *City of Edmonds v. Oxford House, Inc.*,<sup>251</sup> Justice Ginsburg, for the majority, held that rules that cap the total number of occupants to prevent overcrowding of a dwelling fell within the section 3607(b)(1) exemption from the Fair Housing Act's governance.<sup>252</sup> Citing to a House Report, she said that the statutory language "surely encompass[ed] maximum occupancy restrictions."<sup>253</sup> She also noted, citing to a House hearing, that "landlords may refuse to stuff large families into small quarters."<sup>254</sup>

In *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding & Dry Dock Co.*,<sup>255</sup> the Director of the Office of Workers' Compensation Programs sought judicial review of a decision by the Benefits Review Board awarding an injured claimant only partial disability benefits for the period of his unemployment under the Longshore and Harbor Workers' Compensation Act (LHWCA).<sup>256</sup> Justice Scalia, for the Court, held that the Director was not the "person adversely affected or aggrieved" within the meaning of the LHWCA by the Court's decision, and she thus lacked standing to appeal the order, since the agency could not, absent specific authorization to appeal, be adversely affected or aggrieved.<sup>257</sup> In her concurring opinion, Justice Ginsburg noted that Congress enacted the Black Lung Benefits Act (BLBA)<sup>258</sup> in 1969 to afford compensation to coal miners and their survivors for death or disability caused by black lung disease.<sup>259</sup> Citing to a Senate Report, she noted that Congress amended the BLBA to clarify that the BLBA continuously incorporates LHWCA claim adjudication procedures.<sup>260</sup> Citing to a Conference Report, she also noted that "in the context of assuring automatic application of LHWCA procedures to black lung claims, Congress added to the BLBA the provision for the Secretary of

---

248. See *id.* at 467.

249. *Id.* at 463.

250. See *id.* at 464 n.7 (citing H.R. REP. NO. 88-1384, at 25 (1964)).

251. 115 S. Ct. 1776 (1995).

252. See *id.* at 1782.

253. *Id.* at 1781-82 n.8 (citing H.R. REP. NO. 100-711, at 31 (1988)).

254. *Id.* at 1782 n.9 (citing *Fair Housing Amendments Act of 1988: Hearings on H.R. 1158 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong. 656 (1987) (remarks of Rep. Edwards)).

255. 115 S. Ct. 1278 (1995).

256. 33 U.S.C. §§ 901-950 (1994).

257. See *Newport News*, 115 S. Ct. at 1283-84.

258. 30 U.S.C. §§ 901-945 (1994).

259. See *Newport News*, 115 S. Ct. at 1289 (Ginsburg, J., concurring).

260. See *id.* at 1290 (Ginsburg, J., concurring) (citing S. REP. NO. 95-209, at 18 (1977)).

Labor's party status in any proceeding relative to a claim for [black lung] benefits."<sup>261</sup>

In *Miller v. Johnson*,<sup>262</sup> Justice Kennedy, for the majority, held that: (1) a bizarre shape of a congressional district was not the threshold requirement of claim of racial gerrymandering;<sup>263</sup> (2) the allegation that race was the legislature's dominant and controlling rationale in drawing district lines was sufficient to state a claim;<sup>264</sup> and (3) Georgia's congressional redistricting plan violated the equal protection clause.<sup>265</sup> Section 5 of the Voting Rights Act "require[d] Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a 'standard, practice, or procedure with respect to voting.'"<sup>266</sup> Citing to a House Report, Justice Kennedy said that section 5 was "directed at preventing a particular set of invidious practices which had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.'"<sup>267</sup>

In *Libretti v. United States*,<sup>268</sup> Justice O'Connor, for the majority, dealt with a forfeiture provision embodied in a plea agreement. The question was whether forfeiture is a punishment. Citing to a Senate Report that dealt with the Comprehensive Crime Control Act of 1984,<sup>269</sup> Justice O'Connor said: "Congress plainly intended forfeiture of assets to operate as punishment . . . ."<sup>270</sup>

In *Curtiss-Wright Corp. v. Schoonejongen*,<sup>271</sup> retired employees sued their employer under ERISA for wrongful termination of postretirement health care benefits. Justice O'Connor, writing for the Court, held that one question was whether the plan's amendment procedure was complied with.<sup>272</sup> Justice O'Connor noted that the scheme conveyed enough detail to enable beneficiaries to learn their rights and obligations under the plan at any time.<sup>273</sup> Citing a House Report, she noted that the basis of the scheme is another of ERISA's core functional requirements, that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument."<sup>274</sup>

In *American Airlines v. Wolens*,<sup>275</sup> Justice Ginsburg, for the majority, held that the Airline Deregulation Act<sup>276</sup> preempted claims based on the Illinois Consumer

---

261. *Id.* at 1290 (Ginsburg, J., concurring) (citing H.R. CONF. REP. NO. 95-864, at 22-23 (1978)).

262. 115 S. Ct. 2475 (1995).

263. *See id.* at 2486.

264. *See id.* at 2482.

265. *See id.* at 2490.

266. *Id.* at 2483.

267. *Id.* at 2493 (quoting H.R. REP. NO. 91-397, at 8 (1969) (alterations in original)).

268. 116 S. Ct. 356 (1995).

269. Pub. L. No. 98-473, Tit. 2, 98 Stat. 1837 (codified in scattered sections of 18 U.S.C.).

270. *Libretti*, 116 S. Ct. at 363 (citing S. REP. NO. 98-225, at 193 (1983)).

271. 115 S. Ct. 1223 (1995).

272. *See id.* at 1230.

273. *See id.* at 1229-30.

274. *Id.* at 1230 (quoting 29 U.S.C. § 1102 (1994) and citing H.R. REP. NO. 93-1280, at 297 (1974)) (alteration in original) (emphasis omitted).

275. 115 S. Ct. 817 (1995).

276. Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app.).

Fraud and Deceptive Business Practices Act,<sup>277</sup> but the Deregulation Act did not preempt a state law breach of contract action alleging that the airline had violated the agreement which it had entered into with its passengers.<sup>278</sup> Concurring in part and dissenting in part and citing to a House Conference Report, Justice O'Connor said that Congress had recently revisited § 1305 of the Act and said it did not intend to alter the broad preemption interpretation adopted earlier by the United States Supreme Court.<sup>279</sup>

*Celotex Corp. v. Edwards*<sup>280</sup> concerned the jurisdiction of bankruptcy courts. Chief Justice Rehnquist, for the majority, dealt with the question of "related to" jurisdiction. He said that the Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggested a grant of some breadth.<sup>281</sup> Citing to a Senate Report and to a House Report, he noted that the jurisdictional grant in 28 U.S.C. § 1334(b) was a distinct departure from the jurisdiction conferred upon previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction.<sup>282</sup> Justice Stevens, with Justice Ginsburg joining, dissented, arguing that the bankruptcy judge lacked jurisdiction to issue an injunction.<sup>283</sup> Justice Stevens noted that the jurisdictional structure of the Bankruptcy Code reflected the decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>284</sup> which in turn addressed the Bankruptcy Reform Act of 1978.<sup>285</sup> Citing to a statement on the floor of Congress, he noted that the 1984 amendments regarding the powers of the bankruptcy court were passed to comply with *Northern Pipeline*.<sup>286</sup> Citing a statement of Senator Hatch, Justice Stevens also said that the primary effect of the 1986 amendments was to give the bankruptcy judges the power to issue orders sua sponte and did not reflect any expansion of the power of bankruptcy judges to enjoin other courts.<sup>287</sup>

In the case of *Field v. Mans*,<sup>288</sup> Justice Souter, for the Court, held that the fraud exception to discharge in bankruptcy requires justifiable, but not reasonable, reliance.<sup>289</sup> He noted that the House Report suggested that Congress wanted to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because

---

277. See *American Airlines*, 115 S. Ct. at 823-24.

278. *Id.* at 826.

279. See *id.* at 832 (O'Connor, J., concurring in part and dissenting in part) (citing H.R. CONF. REP. NO. 103-677, at 83 (1994)).

280. 115 S. Ct. 1493 (1995).

281. See *id.* at 1498-99.

282. See *id.* at 1493 (citing S. REP. NO. 95-989, at 153, 154 (1978) and H.R. REP. NO. 95-595, at 43-48 (1977)).

283. See *id.* at 1503 (Stevens, J., dissenting).

284. 458 U.S. 50 (1982).

285. See *Celotex*, 115 S. Ct. at 1504 (Stevens, J., dissenting).

286. See *id.* at 1509 (Stevens, J., dissenting) (citing 139 CONG. REC. 20,089 (1984)).

287. See *id.* (Stevens, J., dissenting) (citing 132 CONG. REC. 28,610 (1986) (statement of Sen. Hatch)).

288. 116 S. Ct. 437 (1995).

289. See *id.* at 446.

the relative equities might be affected by practices of consumer finance companies, which sometimes have encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge.<sup>290</sup>

In *Adarand Constructors, Inc. v. Pena*,<sup>291</sup> a subcontractor who was not awarded a portion of a federal highway project brought an action challenging the constitutionality of a federal program designed to provide highway contracts to disadvantaged business enterprises. The Court, Justice O'Connor, held that all racial classifications, imposed by whatever governmental actor, must be analyzed by the reviewing court under strict scrutiny.<sup>292</sup> Justice Souter dissented, arguing that the legislative schema had previously been justified as providing remedies for the continuing effects of past discrimination and citing to a Senate Report.<sup>293</sup>

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,<sup>294</sup> commercial insurers, fiduciaries for ERISA plans, brought suits challenging New York statutes imposing surcharges on hospital rates for patients whose commercial insurance coverage was purchased by employee health care plans governed by ERISA and for surcharges on health maintenance organizations insofar as their membership fees were paid by the ERISA plan. Justice Souter, for the Court, held that section 514 of ERISA providing for surcharges did not "relate to" employee benefit plans and, accordingly, was not preempted.<sup>295</sup> According to Representative Dent, a sponsor of the Act, the objective was to eliminate the threat of conflicting and inconsistent state and local regulation.<sup>296</sup> Justice Souter noted that the history of Medicare regulation made the same point, confirming that Congress never envisioned ERISA preemption as blocking state health care cost control, but rather meant to encourage and rely on state experimentation.<sup>297</sup>

In *Shalala v. Whitecotton*,<sup>298</sup> Justice Souter, for the majority, held that a claimant who shows that she experienced symptoms of injury after receiving a vaccination did not make out a prima facie case for compensation under the National Childhood Vaccine Injury Act,<sup>299</sup> where evidence failed to indicate that she had no symptoms of that injury before her vaccination.<sup>300</sup> Citing to a House Report, Justice Souter noted that for injuries and deaths traceable to vaccination, the Act established a scheme of recovery designed to work faster and with greater ease than the civil tort system.<sup>301</sup>

---

290. See *id.* at 447 (citing H.R. REP. NO. 95-595, at 130-31 (1977)).

291. 115 S. Ct. 2097 (1995).

292. See *id.* at 2113.

293. See *id.* at 2131 (Souter, J., dissenting) (citing S. REP. NO. 100-4, at 11 (1987)).

294. 115 S. Ct. 1671 (1995).

295. See *id.* at 1676-83.

296. See 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent).

297. See *Travelers*, 115 S. Ct. at 1682 n.6 (citing H.R. REP. NO. 98-25, at 1 (1983)).

298. 115 S. Ct. 1477 (1995).

299. 42 U.S.C. §§ 300aa-1 to 300aa-33 (1994).

300. See *Whitecotton*, 115 S. Ct. at 1480.

301. See *id.* at 1478 (citing H.R. REP. NO. 99-908, at 3-7 (1986)).

In *Chandris, Inc. v. Latsis*,<sup>302</sup> Justice Stevens wrote a concurring opinion and cited to a Senate Report, noting that the Longshore and Harbor Workers' Compensation Act<sup>303</sup> was originally a gap-filling measure intended to create coverage for those workers for whom states could not provide compensation.<sup>304</sup>

---

302. 115 S. Ct. 2172 (1995).

303. 33 U.S.C. §§ 901-950 (1994).

304. See *Chandris*, 115 S. Ct. at 2199 (Stevens, J., concurring) (citing S. REP. NO. 69-973, at 16 (1926)).

## APPENDIX B

*1995 Tenth Circuit Cases Dealing with Legislative History*

*Frymire v. Ampex Corp.*<sup>305</sup> was the only Tenth Circuit case in 1995 in which both the majority and the dissent used legislative history to help make their case. Writing for the majority, Judge Bright said: "Because the Worker Adjustment and Retraining Act (WARN) is susceptible to more than one reasonable interpretation, we would ordinarily turn to other legislative materials to ascertain Congress' intent."<sup>306</sup> Citing to a House Conference Report, however, he noted that Congress' various attempts at clarification were susceptible to multiple interpretations.<sup>307</sup> Judge Kelley, concurring in part and dissenting in part, said that under the WARN Act the majority held that the employer operated two separate sites for purposes of determining whether the layoff met threshold requirements for WARN coverage.<sup>308</sup> Judge Kelly found that a single site of employment was "not a situation in which there were two separate plants or two separate mines, situations in which a finding of multiple sites of employment would be appropriate."<sup>309</sup>

In *United States v. Acosta-Olivas*,<sup>310</sup> Judge Anderson noted that 18 U.S.C. § 3553(f) "was enacted as a safety valve to permit courts to sentence less culpable defendants to sentences under the sentencing guidelines instead of imposing mandatory minimum sentences."<sup>311</sup> He noted that as the legislative history of the section states, without such a safety valve, for the very offenders who most warrant proportionally lower sentences — offenders that by guideline definitions are the least culpable — mandatory minimums generally operate to block the sentence from reflecting mitigating factors.<sup>312</sup>

In *United States v. Gomez*,<sup>313</sup> Judge Anderson noted that Congress considered the circumstances under which the protections of the Speedy Trial Act<sup>314</sup> could be waived and limited waiver of the seventy-day speedy trial requirement to narrowly defined circumstances, i.e., "a failure to move for dismissal prior to trial or prior to the entry of a guilty or nolo contendere plea."<sup>315</sup>

---

305. 61 F.3d 757 (10th Cir. 1995).

306. *Id.* at 771.

307. *See id.* at 771-72 (citing H.R. CONF. REP. NO. 100-576 (1988) and S. REP. NO. 100-62 (1987)).

308. *See id.* at 774 (Kelley, J., concurring in part and dissenting in part).

309. *Id.* at 775 (Kelley, J., concurring in part and dissenting in part) (citing *United Paperworkers Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51, 56 (2d Cir. 1993) (citing H.R. REP. NO. 100-576 at 1045 (1988))).

310. 71 F.3d 375 (10th Cir. 1995).

311. *See id.* at 378.

312. *See id.* (citing H.R. REP. NO. 103-460 (1994)).

313. 67 F.3d 1515 (10th Cir. 1995).

314. 18 U.S.C. §§ 3161-3174 (1994).

315. *Id.* at 1520 n.6 (citing *United States v. Gambina*, 59 F.3d 353, 360 (2d Cir. 1995) and *United States v. Pringle*, 751 F.2d 419, 433 (1st Cir. 1984) (citing S. REP. NO. 90-212, at 28-29 (1979))).



In *Vornado Air Circulation Systems, Inc. v. Duracraft Corp.*,<sup>316</sup> a fan manufacturer brought an action against a competitor, alleging the spiral configuration of the competitor's grill design infringed the manufacturer's trade design. On the question of the public's right to copy a patent, Judge Anderson noted that the legislative history was ambiguous.<sup>317</sup> He said: "Because trademarks promote competition and product quality, 'Congress determined that 'a sound public policy requires that trademarks should receive nationally the greatest protection that can be given them.'"<sup>318</sup>

In *Murray ex rel. Murray v. Montrose County School District RE-1J*,<sup>319</sup> Judge Anderson said that nothing in the language or legislative history of the Individuals with Disabilities Education Act<sup>320</sup> (IDEA) suggested that Congress intended to dispense with the use of summary judgment.<sup>321</sup> Without giving specific citations, Judge Anderson said that legislative statements surrounding the enactment of the IDEA did not clearly indicate that Congress, in discussing mainstreaming and the concept of the least restrictive environment for each disabled child, meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children.<sup>322</sup>

In *White v. York International Corp.*,<sup>323</sup> Judge Anderson interpreted the Rehabilitation Act's "otherwise qualified" requirement in determining whether the plaintiff was "qualified" under the Americans with Disabilities Act.<sup>324</sup>

*United States v. Bolton*<sup>325</sup> dealt with the interpretation of the Hobbs Act.<sup>326</sup> Judge Baldock noted that the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce.<sup>327</sup> Citing to a House Report, he said that Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce.<sup>328</sup>

In his dissent in *United States v. Richards*,<sup>329</sup> Judge Baldock with respect to a definitional issue said: "The majority points to nothing in the statute, its legislative history, or interpretative case law to indicate that Congress intended the words

316. 58 F.3d 1498 (10th Cir. 1995).

317. See *id.* at 1505 (referencing S. REP. NO. 100-515, at 40 (1988)).

318. *Id.* at 1508 (quoting *Park 'n Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (quoting S. REP. NO. 79-1333, at 6 (1946))).

319. 51 F.3d 921 (10th Cir. 1995).

320. 20 U.S.C. §§ 1400-1491o (1994).

321. See *id.* at 928 n.12.

322. See *id.* at 929.

323. 45 F.3d 357 (10th Cir. 1995).

324. See *id.* at 360 n.5 (quoting H.R. REP. NO. 101-485, at 23 (1990) ("The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business.")).

325. 68 F.3d 396 (10th Cir. 1995).

326. 18 U.S.C. § 1951(a), (b)(3) (1994).

327. See *Boulton*, 68 F.3d at 399.

328. See *id.* at 399 (citing H.R. REP. NO. 79-238 (1945)).

329. 67 F.3d 1531 (10th Cir. 1995).

'mixture or substance' have different definitions in different subsections of [21 U.S.C.] § 841.<sup>1330</sup>

In *United States v. Marchant*,<sup>331</sup> Judge Baldock noted that Congress enacted the Gun Control Act,<sup>332</sup> "because 'it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.'"<sup>333</sup> He quoted from a Senate Report: "The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'"<sup>334</sup> Citing to a House Report, Judge Baldock also noted that the Firearms Owners Protection Act increased the Bureau of Alcohol, Tobacco, and Firearms' "ability to keep firearms out of the hands of criminals."<sup>335</sup>

In *Snyder v. Shalala*,<sup>336</sup> Judge Baldock said: "If claimant were merely asking the Secretary to increase the amount of her wages . . . , we would agree that 42 U.S.C. § 405(c)(5)(H) (1991), 20 C.F.R. § 404.822(e)(5) (1994), and relevant *legislative history* authorize the Secretary to make such changes."<sup>337</sup>

In *United States v. Colorado & E.R.R.*,<sup>338</sup> Judge Barrett, citing to a Senate Report, said:

With the enactment of SARA in 1986, Congress codified . . . [the] implied right of contribution by amending CERCLA § 113 to expressly recognize a right of contribution. . . . A principal objective of the new contribution section was to "clarif[y] and confirm[] the right of a person held jointly and severably liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances."<sup>339</sup>

Citing a House Report, Judge Barrett added: "[T]he burden of proof is on the . . . party seeking apportionment to establish that it should be granted."<sup>340</sup>

In *United States v. Browning*,<sup>341</sup> the issue was whether 18 U.S.C. § 3147 constituted a separate offense of conviction or merely a sentencing enhancement. Judge Brorby for the court found it a sentencing enhancement and cited to the legislative history of the provision, which reflected Congress' intent that the

---

330. *Id.* at 1543 (Baldock, J., dissenting).

331. 55 F.3d 509 (10th Cir. 1995).

332. 18 U.S.C. §§ 921-930 (1994).

333. *Id.* at 513 (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974)).

334. *Id.* (quoting S. REP. NO. 90-1501, at 22 (1968)).

335. *Id.* at 514 (citing H.R. REP. NO. 99-495, at 3 (1986)).

336. 44 F.3d 896 (10th Cir. 1995).

337. *Id.* at 899 (emphasis added).

338. 50 F.3d 1530 (10th Cir. 1995).

339. *Id.* at 1535 (citing S. REP. NO. 99-11, at 44 (1985)).

340. *Id.* at 1536 (citing H.R. REP. NO. 99-253 (III), at 19 (1986)).

341. 61 F.3d 752 (10th Cir. 1995).

potential for enhanced punishment serve as a deterrent to the commission of crimes during bail release<sup>342</sup>

Judge Burciaga in *United States v. Grissom*<sup>343</sup> said the purpose behind the Victims and Witness Protection Act<sup>344</sup> was "'to restore the victim to his or her prior state of well being' to the highest degree possible."<sup>345</sup>

In *United States v. Diaz-Bonilla*,<sup>346</sup> Judge Cook found that in classifying a prior state conviction for purposes of enhancement of a reentry offense, a felony was defined by reference to the maximum penalty authorized for the offense by the state statute of conviction, not by the classification applied by the state statute.<sup>347</sup> Citing to a Senate Report, he said that "among the reasons the [Sentencing] Guidelines were enacted was to 'eliminate indeterminate sentencing' and to 'make criminal sentencing faster and more certain.'"<sup>348</sup>

Judge Ebel in *United States v. Wacker*<sup>349</sup> found the legislative history of the Federal Youth Corrections Act<sup>350</sup> indicated that the purpose of allowing a conviction to be set aside was to offer the youthful offender a new start.<sup>351</sup>

In *Bangerter v. Orem City Corp.*,<sup>352</sup> Judge Ebel said that the FHAA's prohibitions clearly extended to discriminatory zoning practices.

The House Committee Report accompanying the FHAA states that the FHAA "is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [the handicapped] to live in the residence of their choice in the community."<sup>353</sup>

Judge Henry, dissenting in *Woods Petroleum Corp. v. Department of Interior*,<sup>354</sup> concluded, after considering the provisions of the Indian Mineral Leasing Act,<sup>355</sup> the accompanying regulations, and the Act's legislative history, that Congress intended for the Secretary of the Interior to act as a fiduciary for Indian mineral owners. "We deem it significant that the Act was passed because, 'it [was] not believed that the present law [was] adequate to give the Indians the greatest return

---

342. See *id.* at 756 (citing S. REP. NO. 98-225 (1983)).

343. 44 F.3d 1507 (10th Cir. 1995).

344. 18 U.S.C. § 3663(a)(1) (1994).

345. *Id.* at 1515 (citing *United States v. Hill*, 798 F.2d 402, 405 (10th Cir. 1986) (quoting S. REP. NO. 97-352, at 30 (1982))).

346. 65 F.3d 875 (10th Cir. 1995).

347. See *id.* at 877.

348. *Id.* at 877 (quoting S. REP. NO. 98-225, at 65 (1984)).

349. 72 F.3d 1453 (10th Cir. 1995).

350. 18 U.S.C. § 5021(b) (repealed 1984).

351. See *id.* at 1479 (citing *United States v. Ashburn*, 20 F.3d 1336, 1343 (5th Cir. 1994) (quoting 107 CONG. REC. 8709 (1961) (statement of Sen. Dodd))).

352. 46 F.3d 1491 (10th Cir. 1995).

353. *Id.* at 1498 (quoting H.R. REP. NO. 100-711, at 24 (1988)) (alteration in original).

354. 47 F.3d 1032 (10th Cir. 1995).

355. 25 U.S.C. §§ 396a-396g (1994).

from their property."<sup>356</sup> As originally drafted, 25 U.S.C. § 396 authorized the leasing of allotted lands without restrictions. However, Judge Henry, citing to a House Report, said the Secretary of the Interior objected to the absence of restrictions, observing that "[e]xperience has shown that this is unjust to the Indians, as the inrush of prospective miners is always prejudicial to the Indians' interests, and, in justice to them, the Department should not recommend favorable action on any bill that would render them insecure in their homes."<sup>357</sup>

In *Lujan v. Regents of the University of California*,<sup>358</sup> Judge Jenkins, citing to a Senate Report, noted that the Price-Anderson Act<sup>359</sup> was enacted to protect the public and to encourage the development of the atomic energy industry.<sup>360</sup> Citing to the same report, he said that although the statutory language<sup>361</sup> appeared to make it discretionary whether to require a limited waiver of any statute of limitations defense, Congress and the courts have construed the Act and its amendments as establishing a statute of limitations, as least for actions arising out of an extraordinary nuclear occurrence.<sup>362</sup> Citing to a House Report, he noted that exposure to radiation can occur without the slightest indication of its presence and the effects of such exposure may lie dormant for years.<sup>363</sup> Thus, Congress was aware of the potentials for injustice.<sup>364</sup>

In *Estate of Hoover v. Commissioner*,<sup>365</sup> Judge Kelly noted that under 26 U.S.C. § 2032A, the executor of an estate may make an election to value qualified real property at the value for the use under which it qualifies; the use of real property for farming or ranching purposes is enumerated as a "qualified use."<sup>366</sup> Citing a House Report, he said that Congress enacted § 2032A to provide relief to the heirs of family farms, who might be forced to sell their land to pay estate taxes if it were valued at its fair market value based on highest and best use.<sup>367</sup>

In *Utah v. Babbitt*,<sup>368</sup> Judge Kelly said the legislative history of the Indian Mineral Development Act made clear that Congress intended the Navajos to benefit

356. *Woods Petroleum*, 47 F.3d at 1042 (Henry, J., dissenting) (citing *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1565 (10th Cir. 1984) (quoting S. REP. NO. 75-985, at 2 (1937))) (alterations in original).

357. *Id.* at 1043 (Henry, J., dissenting) (quoting H.R. REP. NO. 60-1225, at 2 (1908)) (alteration in original).

358. 69 F.3d 1511 (10th Cir. 1995).

359. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. §§ 2011 to 2297g-4 (1994)).

360. *See Lujan*, 69 F.3d at 1514.

361. *See* 42 U.S.C. § 2210(n) (1994).

362. *See Lujan*, 69 F.3d at 1515 (citing S. REP. NO. 100-70, at 15 (1987)).

363. *See id.* at 1518.

364. *See id.* (citing H.R. REP. NO. 100-104, at 17 (1987)).

365. 69 F.3d 1044 (10th Cir. 1995).

366. *See id.* at 1046.

367. *See id.* (citing H.R. REP. NO. 94-1380, at 22 (1976)).

368. 53 F.3d 1145 (10th Cir. 1995).

from leasehold development: "provision is made for disposition of any revenue arising from and oil and gas which might be discovered."<sup>369</sup>

In *Werner v. McCotter*,<sup>370</sup> Judge McKay, citing to a Senate Report, said: "Courts should continue to give 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'"<sup>371</sup>

In *Hernandez-Avalos v. INS*,<sup>372</sup> Judge Reed noted that § 225 of the Immigration and Nationality Technical Corrections Act of 1994<sup>373</sup> provides that no amendment made by that Act and nothing in § 242(i) of the Immigration and Nationality Act<sup>374</sup> shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies.<sup>375</sup> Citing to floor debate, Judge Reed said that § 1252(i) was enacted for the benefit of taxpayers, the objective being to save money by deporting criminal aliens as soon as their sentences ended and thus avoiding the expense of housing and feeding them while they awaited deportation; "[t]he legislative history makes this clear."<sup>376</sup>

In *Jane L. v. Bangerter*,<sup>377</sup> citing to a House Report, Judge Seymour said that a prevailing defendant may recover attorney's fees only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.<sup>378</sup>

In *Richman v. Straley*,<sup>379</sup> Judge Seymour, citing to a House Report, said: "Congress did not view the fact that the same body both appointed and removed bankruptcy trustees as problematic. Instead, the existing system was tainted because the trustees 'appeared in bankruptcy court before the very same judges who appointed them.'"<sup>380</sup>

In *United States v. Carrillo-Bernal*,<sup>381</sup> Judge Shadur, citing to two Senate Reports and a subcommittee hearing, said: "The legislative history reveals a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the incumbent possibility of multiple trials."<sup>382</sup>

369. *Id.* at 1149 (citing H.R. REP. NO. 72-1883, at 2 (1933)).

370. 49 F.3d 1476 (10th Cir. 1995).

371. *See id.* at 1479-80 (quoting S. REP. NO. 103-111, at 9-11 (1993)).

372. 50 F.3d 842 (10th Cir. 1995).

373. Pub. L. No. 103-416, 108 Stat. 4305.

374. 8 U.S.C. § 1252(i) (1994).

375. *See Hernandez-Avalos*, 50 F.3d at 844.

376. *See id.* at 847-48 n.12 (citing 132 CONG. REC. H9794 (daily ed. Oct. 9, 1986) (statement of Rep. McKay) and 132 CONG. REC. S16,908 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson)).

377. 61 F.3d 1505 (10th Cir. 1995).

378. *See id.* at 1513 (citing to *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (citing H.R. REP. NO. 94-1558, at 7 (1975))).

379. 48 F.3d 1139 (10th Cir. 1995).

380. *Id.* at 1143 (quoting H.R. REP. NO. 99-764 (1986)).

381. 58 F.3d 1490 (10th Cir. 1995).

382. *Id.* at 1495-96 (citing *Anti-Crime Program: Hearings before Subcomm. No. 5 of the Comm. on the Judiciary*, 90th Cong. 1530-33 (1967); S. REP. NO. 85-1478, at 16 (1958); S. REP. NO. 84-1997,

In *United States v. Reorganized CF&I Fabricators*,<sup>383</sup> the issue was whether a court may subordinate a nonpecuniary loss tax penalty claim without a showing of misconduct on the part of the government. Judge Tacha agreed with the analysis of *In re Virtual Network Services Corp.*,<sup>384</sup> which did a thorough analysis of the legislative history.<sup>385</sup>

---

at 11 (1956) (noting that Congress was persuaded only as to drug cases)).

383. 53 F.3d 1155 (10th Cir. 1995).

384. 902 F.2d 1246, 1247-49 (7th Cir. 1990).

385. See *Reorganized*, 53 F.3d at 1248 (citing S. REP. NO. 95-989, at 74 (1978); H.R. REP. NO. 95-595, at 359 (1978); 124 CONG. REC. H11,089-H11,117 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 CONG. REC. S17,403-S17,434 (daily ed. Sept. 28, 1978) (statement of Sen. DiConcini)). However, Judge Tacha found this legislative history inconclusive. See *id.* at 1158-59.

## APPENDIX C

"Legislative history is not history in the usual sense of a narrative record or interpretations of past events."<sup>386</sup> A legislative history, instead, is the term used to designate the documents that contain the information considered by the legislature prior to deciding whether or not to enact a law. One purpose of a legislative history is to facilitate one's understanding of the reasons behind an enactment of a law.<sup>387</sup>

This appendix discusses a specific area of legislative history — statutory interpretation. It is, of course, possible to want to know the legislative history of a bill that is pending or of a bill that was never enacted into law. However, lawyers, judges, and legal scholars are usually much more interested in the legislative history of a bill that *is* enacted into law. This legislative history is used to interpret a particular statutory section or words or phrases in that section.

Many legal scholars and lawyers are unsure how to begin and where to look for documents dealing with statutory interpretation on the federal level.

*Legislative History: What It Is and Where To Find It*

As mentioned above, in the general field of federal legislative history I am interested in the specific area of statutory interpretation. I have cited two excellent books on legal research which have good chapters on legislative history.<sup>388</sup>

In what follows, I will be quoting liberally from both, though, again, with my focus particularly on statutory interpretation. One shortcoming of both of the chapters mentioned above, at least when read in isolation, is that neither notes that as far as interpreting legislative intent all legislative documents are secondary in importance to case law. That is, a researcher needs to first find out if there is case law analyzing the particular code section or act or public law or bill. If the Supreme Court has already pronounced upon a certain point of statutory interpretation, no more research may be needed. If the Tenth Circuit has analyzed a certain statute, that would be less definitive than the Supreme Court's interpretation of the same statute, of course, though still authoritative for cases involving statutory interpretation appealed to that circuit. Of course, any case interpretation of a statute, except that of the United States Supreme Court, can be treated as only persuasive and therefore rebuttable. Thus, the normal legislative materials — committee reports, committee hearings, and floor debate — could still be useful.

With the above caveat concerning case law research, let us next examine which legislative documents to look for and where to find them. In particular, I will discuss congressional bills, committee reports, committee hearings, and congressional debates. I will not discuss committee prints or presidential or executive agency documents because my analysis of 1995 Supreme Court and Tenth Circuit decisions show that these legislative materials are rarely used. The reader wishing

---

386. MORRIS COHEN ET AL., *HOW TO FIND THE LAW* 217 (9th ed. 1989).

387. See J. MYRON JACOBSTEIN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 191 (6th ed. 1994).

388. See COHEN ET AL., *supra* note 386, ch. 7; JACOBSTEIN ET AL., *supra* note 387, ch. 10.

to know more about these can consult the chapters in the two books mentioned above.

### *Congressional Bills*

A proposed piece of legislation is introduced as a bill or a joint resolution into either the House of Representatives, where it is assigned an H.R. or H.J. Res. (for Joint Resolution) number, or the Senate, where it is assigned either an S. or S.J. Res. number. This number stays with the bill until it is passed or until the end of the Congress in which it was introduced. (Each Congress lasts two years.) When a bill is amended, it is usually reprinted with the amending language. The comparison of the language of the bill, as introduced and its subsequent amendments, with the final language as passed (the public law) may reveal legislative intent, since the insertions or deletion of language may indicate a legislative choice.<sup>389</sup>

Therefore, the researcher needs to be aware of the following:

- a. The bill as originally introduced in the House or Senate.
- b. The bill with any amendments.
- c. The bill as it passed in the originating body and as introduced into the other house.
- d. The bill as amended by the second house.
- e. The bill as it is passed by the second house.
- f. The bill as amended by a conference committee of the House and Senate.
- g. The public law.<sup>390</sup>

However, in my experience, this obsessive comparison of different bills is not done much. If the researcher does pursue this route, the best tool to use to figure out which bill versions exist is the CCH *Congressional Index*. Commerce Clearing House has published this since 1937, and it is widely available. It is updated weekly while Congress is in session and for several weeks thereafter until all public bills and resolutions sent to the President have been acted upon. New volumes are issued for each Congress.<sup>391</sup>

The index's digest section provides the contents of each bill introduced in Congress. There are status tables for pending bills in the Senate and in the House. The status tables set forth actions (including amendments) taken on the bill, provide committee report numbers, and notes if hearings were held and on what date.<sup>392</sup> However, the *Congressional Index* does not contain the actual text of bills, debates, reports, or laws. It is only a finding tool but a very useful one.

To get the full text of a bill and its various versions, the first choice is LEXIS (LEGIS, CODES, and GENFED libraries; BLTXT file). The full text of bills are available beginning with the 101st Congress (1989). Moreover, the researcher can

---

389. See JACOBSTEIN ET AL., *supra* note 387, at 193.

390. *Id.* at 193-94.

391. Each Congress lasts two years and is divided into the first session (the odd-numbered year) and the second session (the even-numbered year). The 105th Congress began in 1997.

392. See JACOBSTEIN ET AL., *supra* note 387, at 206.



use the LEXIS focus feature to easily find particular parts of bills. WESTLAW also has the full text of bills in its CQ-BILLTXT database, beginning with the 103d Congress (not included in law school subscription contracts) and in its CONG-BILLTXT database, beginning with the 104th Congress (available to law schools).

If LEXIS is not an option, there are two microfiche collections:

(a) *United State Congress Public Bills and Resolutions*. This set, published by the United States Government Printing Office, contains the text of all bills and amendments since the 96th Congress (1979). Access to this set is provided by the *Microfiche Users/Eill Finding Aid*.

(b) *CIS/Microfiche Library*. From 1935, CIS provides reprints of the bills that have become public laws.

### *Committee Hearings*

"Hearings are held by the standing and special committees of the House and Senate to investigate particular problems or situations, and also to elicit the views of persons or groups interested in proposed legislation."<sup>393</sup> "The hearings, as published, consist of transcripts of testimony before a particular committee or subcommittee, questions by the legislators and answers by witnesses, [and] exhibits submitted by interested individuals or organizations . . . ."<sup>394</sup>

"Committee hearings are technically not part of a legislative history since they do not contain congressional deliberations but rather views of non-legislators of what the bill under consideration should accomplish. [However, o]ften senators and members of the House of Representatives may present testimony. Therefore, hearings should be consulted . . . because they frequently contain information helpful to understanding why Congress adopted or did not adopt certain language based on the testimony heard . . . ."<sup>395</sup> "The testimony they contain may range from the helpful and objective views of disinterested experts to the partisan comments of interest groups."<sup>396</sup>

Congressional Information Service has published its legislative service *CIS/Index* since 1970. *CIS/Index* offers the most complete and detailed indexing and abstracting of the documents of legislative history, including hearings, for each congressional session. From 1970 to 1983, two permanent volumes were published for each year — an *Index* volume and an *Abstracts* volume, which included a section providing cumulative legislative histories of enacted laws. The legislative history for enacted laws has since 1984 appeared in a third annual volume called *Legislative Histories*.

CIS gives the researcher the Superintendent of Documents (SuDoc) number by which one can get the text of the hearing in a government depository library. CIS also publishes in microfiche the full text of all Senate and House hearings.

---

393. COHEN ET AL., *supra* note 386, at 224.

394. *Id.*

395. JACOBSTEIN ET AL., *supra* note 387, at 195.

396. COHEN ET AL., *supra* note 386, at 224.

On LEXIS, the researcher can also get the full text of many hearings from August 1988 via the Federal News Service (LEGIS library, FEDNEW file). On WESTLAW one can check three different databases for hearings: U.S. Political Transcripts (USPOLTRANS) beginning with February 1994; U.S. Congressional Testimony (USTESTIMONY) beginning with January 1993; and Congressional Testimony (CONGTMY) beginning with July 19, 1995. One would want to use CIS as a guide and then check to see how many of the hearings are actually available on LEXIS and WESTLAW. Hearings are often very long. By using the focus feature on LEXIS or the locate feature on WESTLAW, one can find the particular part of the hearing in which one is interested.

### *Committee Reports*

#### Generally considered

[t]he most important documents of legislative history are the reports of the Congressional committee of each house and the reports of conference committees held jointly by the two houses. The House and Senate committees generally issue a report on each bill when it is sent to the whole house for consideration. . . . These reports reflect the committee's proposal after the bill has been studied, hearings held, and amendments made. They frequently contain the revised text of the bill, an analysis of its content and intent, and the committee's rationale for its recommendations.<sup>397</sup>

"If different versions of a proposed enactment have been passed by each house, a conference committee is convened, including members from each house. The conference committee reconciles the differences and produces an agreed compromise for return to both houses and final passage. . . . Conference committee reports are a very persuasive source for interpretation."<sup>398</sup> "Committee reports and conference committee reports are generally given more weight than any other documents of legislative history, because they are produced by those members of Congress who have worked most closely with the proposed legislation."<sup>399</sup>

The committee reports are published as single pamphlets in separate numerical series for each session of Congress. CIS lists reports for each public law. Also, at the end of the text for each public law in *Statutes at Large* there appears a legislative history summary which includes citations of reports.

For the text of the committee report, the first place to check is *United States Code Congressional and Administrative News* (USCCAN). From 1941 to 1986, USCCAN usually only printed a House Report or a Senate Report. Starting with 1987, "it expanded its coverage, usually including the House or Senate report and the conference report."<sup>400</sup> USCCAN is published by West and thereby has an

---

397. *Id.* at 227-29.

398. *Id.* at 229.

399. *Id.*

400. JACOBSTEIN ET AL., *supra* note 387, at 202.

important connection with *United States Code Annotated*, also a West product. After most code sections in USCA is a Historical Note in which the Legislative History part refers to the text of the committee report in USCCAN which dealt with that code section.

All committee reports are published in a bound series of volumes popularly called the *Serial Set*, which is a government documents depository item.

On WESTLAW for the period 1948 through 1989, the LH database contains only the full text of the reports that appeared in USCCAN. Beginning in 1990, this database contains all committee reports. On LEXIS in the LEGIS library, CMTRPT file, committee reports since 1990 are available.

### *Congressional Debates*

"Floor debate . . . on a pending bill . . . typically takes place after the bill has been reported out by committee. Arguments for and against amendments and passage are made, [and] explanations of unclear or controversial provisions are offered . . . . The essential source for this debate is the *Congressional Record*, which is published daily while either house is in session."<sup>401</sup>

"Some authorities claim that floor statements of legislators on the substance of a bill under discussion are not to be considered by courts as determinative of Congressional intent."<sup>402</sup> "The courts, however, generally do give some weight to such statements, especially when they are made by the bill's sponsors, whose stated intention is to clarify or explain the bill's purpose."<sup>403</sup> However, the "courts rely more on committee reports than on legislative debates for aid in statutory interpretation."<sup>404</sup>

The permanent bound edition of the *Congressional Record* has different pagination than the daily paper edition. The permanent bound edition may not appear until six years after the paper edition. However, when one uses CIS to determine the pertinent documents for statutory interpretation, pagination is not a problem because CIS with respect to debate in the *Congressional Record* only refers to the dates on which debate took place. The *Congressional Record* is available in all government depository libraries and is commonly available in even medium-size law libraries.

LEXIS (GENFED and LEGIS libraries; HOUSE or SENATE files) and WESTLAW (CR database) both have the full text of the *Congressional Record* from 1985. Moreover, LEXIS and WESTLAW are particularly useful to focus in on the debate about a particular bill because of their "focus" or "locate" features, respectively.

---

401. COHEN ET AL., *supra* note 386, at 230.

402. JACOBSTEIN ET AL., *supra* note 387, at 196 (footnote omitted). *But see* *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2427 (1995) (Scalia, J., dissenting).

403. JACOBSTEIN ET AL., *supra* note 387, at 196.

404. COHEN ET AL., *supra* note 386, at 239; *see also supra* tables at pp. 594, 600.

*Compiled Legislative Histories*

"Legislative histories for major legislation, compiled in book form or [microform or on line on LEXIS or WESTLAW], offer a convenient approach to the important documents relating to some laws. At their best, these compilations include [the full text of] bills, hearings, committee reports, . . . and [floor debate] with detailed indexing. A comprehensive compiled legislative history can save the researcher many hours of . . . time in retrieving those documents from their disparate sources. Frequently, however, only *some* of the essential documents are included and often indexing is omitted or inadequate."<sup>405</sup>

The best finding tool for published legislative histories is Nancy P. Johnson, *Source of Compiled Legislative Histories: A Bibliography of Government Documents, Periodical Articles and Books* (1986 & updated periodically).<sup>406</sup> "Arranged chronologically by Congress and Public Law number, it provides a single checklist of all available compiled legislative histories [(except those on LEXIS and WESTLAW)] from the 1st through the [101st] Congress . . . ." <sup>407</sup> It is indexed by the title and the name of the act.<sup>408</sup>

"Many law firms compile legislative histories of enactments . . . . To improve access to [these], the Law Librarians' Society of the District of Columbia has prepared the *Union List of Legislative Histories* [(6th ed. 1991)] which lists legislative histories held by its member libraries."<sup>409</sup>

Finally, LEXIS and WESTLAW have the compiled legislative history of certain important acts in full text:

*WESTLAW:*

Americans with Disabilities Act of 1990 (ADA-LH).

Bankruptcy Amendments and Federal Judgeship Act of 1984 (BANKR84-LH).

Bankruptcy Judges, U.S. Trustees & Family Farms Bankruptcy Act of 1986 (BANKR86-LH).

Bankruptcy Reform Act of 1978 (BANKR78-LH).

Comprehensive Environmental Response, Compensation, & Liability Act of 1980 (CERCLA-LH).

Employees Retirement Income Security Act of 1974 (ERISA-LH).

False Claims Amendments Act of 1986 (FALSECLM-LH).

Family & Medical Leave Act of 1993 (FAMLV-LH).

Financial Institutions Reforms, Recovery & Enforcement Act of 1989 (FIRREA-LH).

Health Security Act — 103d Congress (HEALTH103-LH).

Insider Trading & Securities Enforcement Act of 1988 (INSIDER-LH).

Multiemployer Pensions Act of 1980 (MULTEMPL-LH).

---

405. COHEN ET AL., *supra* note 386, at 257.

406. *See id.*

407. *Id.*

408. *See id.*

409. *Id.*

Superfund Amendments & Reauthorization Act of 1986 (SARA-LH).

Tax Reform Act of 1986 (FTX-TRA86).

*LEXIS:*

Comprehensive Environmental Response, Compensation and Liability Act (CERCLH file, ENVIRN library).

Clean Air Act Amendments of 1990 (CA9OLH file, ENVIRN library).

Clear Air Act Amendments of 1977 (CAALH file, ENVIRN library).

Financial Institutions Reform, Recovery & Enforcement Act of 1989 (FIRREA file, LEGIS library).

National Environmental Policy Act of 1969 (NEPALH file, ENVIRN library).

Superfund Amendments & Reauthorization Act of 1986 (SARA LH file, ENVIRN library).